Supreme Court, U.S.
FEB 28 1994

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

JOINT APPENDIX

J. LOFTON WESTMORELAND*
900 Sun Bank Tower
Pensacola, Fl. 32598
(904) 434-3541
Counsel for Petitioner

LISA NELSON*
Dept. of Prof. Reg.
Northwood Center
1940 No. Monroe Street
Tallahassee, Fl. 32399-0792
(904) 488-0062
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed October 25, 1993
Certiorari Granted January 14, 1994

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8/27/91	Transcript of Administrative Hearing (Disciplinary)
8/28/91	Order Admitting into Disciplinary Record the Rule Challenge Record Pursuant to Parties' Stipulation
1/15/92	Recommended Order, Hearing Officer/Disciplinary Case #91-4100

1/15/92	Final Order, Hearing Officer/Rule Challenge #91-3336R
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STATE OF FLORIDA

Board of Accountancy

BE IT KNOWN THAT

Silvia Safille Ibanez

has passed all examinations and has met all of the other requirements prescribed by law and by the rules of this Board for qualification as an expert public accountant, and is, therefore, entitled to append the letters C. P. A. after this registrant's name to evidence registration by this Board as a

Certified Public Accountant

IN WITNESS WHEREOF, the said Board grants this certificate, No. 10842 under its seal this 2nd day of April, A.D. 1982.

ATTEST

Louis W. Doorn — Chairman

William W. McAlpin

Daryl Sward

Ignacio J. Cadenas — Vice-Chairman

Richard B. Shor

Newton Greene

Judith G. Baker

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212 E Stuart Av Lake Wales..... **676-8584**
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416 S 1st St Lake Wales..... 676-6085

MARTIN & MARTIN
E Snow Martin
E Snow Martin Jr
Michael D Martin
Cecelia M Moore
200 Lake Morton Dr Lakeland..... **688-7611**
Martin Stephen M
1125 US Hwy 98 S Lakeland **683-8765**

SILVIA SAFILLE IBANEZ, JD, CPA, CFP

LAW OFFICES

Silvia S. Ibanez, P. A.

659 AVENUE A, N. W.
WINTER HAVEN, FLORIDA 33881

(813) 299-8550
(813) 299-8553

Silvia S. Ibanez, P.A.

LAW OFFICES

659 AVENUE A, N. W.
WINTER HAVEN, FLORIDA 33881

SILVIA SAFILLE IBANEZ

MEMBER OF:
AMERICAN BAR ASSOCIATION
AMERICAN INSTITUTE OF CPAs
INTERNATIONAL BOARD OF CFPs
FLORIDA BAR ASSOCIATION
FLORIDA INSTITUTE OF CPAs

MAILING ADDRESS:
P. O. DRAWER 7667
WINTER HAVEN, FL 33883-7667
(813) 299-8553
(813) 299-8550

[p. 113] STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION,

Petitioner,

vs. CASE NO. 91-4100

SILVIA IBANEZ,

Respondent,

_____/

PROCEEDINGS:	Disciplinary Hearing
HEARING OFFICER:	ELLA JANE P. DAVIS
DATE:	August 27, 1991
LOCATION:	DOAH The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-1550
REPORTED BY:	L. CAROLYN BILBREY Court Reporter

[p. 114] APPEARANCES

TOBI PAM, Attorney at Law, Senior Attorney Department of Professional Regulation, 1940 N. Monroe Street, Tallahassee, Florida 32399; appeared on behalf of the Petitioner.

MICHAEL SAMPSON, Attorney at Law, PO Box 32092 Lakeland, Florida 33802: appeared on behalf of the Respondent.

SILVIA S. IBANEZ, Attorney at Law, 659 Avenue A, N.W., Winter Haven, Florida 33881; appeared on behalf of the Respondent.

ALSO PRESENT:
MARTHA WILLIS
LOFTON WESTMORELAND

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[p. 116] THE HEARING OFFICER: We're here before the Division of Administrative Hearings on a case, Department of Professional Regulation, Petitioner, against Silvia Ibanez, Respondent; Case No. 91-4100.

My name is Ella Jane P. Davis. I'm the hearing officer assigned to this cause. May I have your appearances, please, on behalf of Petitioner – DPR?

MRS. PAM: Tobi Pam, DPR.

THE HEARING OFFICER: Mrs. Pam, do you have an agency representative with you?

MRS. PAM: Yes, I do. Louis Dooner.

THE HEARING OFFICER: Very well. Welcome, Mr. Dooner.

MR. DONNER [sic]: Dooner, D-O-O-N-E-R.

THE HEARING OFFICER: All right. And for Ibanez.

MR. SAMPSON: Michael Sampson and Silvia Ibanez for respondent. May I inquire about the representative for the Department here? It's my understanding that Mr. Dooner is not on the Board of Accountancy.

MR. DOONER: Is now –

MR. SAMPSON: Is not.

MR. DOONER: That's correct.

THE HEARING OFFICER: What is Mr. Dooner's [p. 117] capacity?

MRS. PAM: He's here as an expert.

THE HEARING OFFICER: Well, is he employed by the agency? Is he an examiner for DPR or something like that?

MRS. PAM: He's on contract with the Department.

THE HEARING OFFICER: Well, if he's only here as an expert witness, I think where Mr. Sampson is going is you want to impose the rule.

MR. SAMPSON: Yes, I do want to invoke the rule.

THE HEARING OFFICER: If he's just being on contract for purposes of this case, Mrs. Pam, it does not make him a designated agency representative, and if the rule is being invoked –

MR. SAMPSON: It is.

THE HEARING OFFICER: Then at the close of opening exercises, I'm going to excuse him.

MRS. PAM: Okay.

THE HEARING OFFICER: Do you have someone else that you wish to designate as an agency representative to sit with you through this?

MRS. PAM: I'll designate Martha Willis.

THE HEARING OFFICER: I'm not trying to encourage you to do that. I'm giving you an [p. 118] opportunity –

MRS. PAM: I understand that.

THE HEARING OFFICER: Okay. Is she with us?

MRS. PAM: My other two witnesses are sitting in the waiting room.

THE HEARING OFFICER: All right.

MRS. PAM: Would you like them to join us?

THE HEARING OFFICER: It will probably be easier to bring everybody in, and we'll swear the witnesses, if the rule is going to be invoked.

MR. SAMPSON: One housekeeping matter – I have sitting with us someone who is not a witness today, but he is Mrs. Ibanez's Counsel in connection with related proceedings to those that are before you. This is Mr. Lofton Westmoreland.

THE HEARING OFFICER: Mr. Westmoreland is not going to testify?

MR. SAMPSON: No, he's here as an attorney.

THE HEARING OFFICER: Well, that's just fine. Welcome, to you, sir.

MR. SAMPSON: I just wanted you to know who everyone is.

THE HEARING OFFICER: I'm sure they've already told you, I will probably massacre your name, too. I apologize.

[p. 119] MR. SAMPSON: Here's his card.

THE HEARING OFFICER: Ladies and gentlemen, this is a disciplinary proceeding, pursuant to 120.57(1), Florida Statutes, and we'll proceed upon the amended administrative complaint.

The duty to go forward, and the burden of proof is upon the agency. And the burden of proof is by clear and convincing evidence under the Affairs against Turlington Doctrine.

This case was originally consolidated with a rule challenge to Rule 21A-20.012, Holding Out Rule; was bifurcated on an emergency basis, and there was a prior ruling in that case, or in both cases when consolidated, that it would be appropriate and I would consider the adoption of testimony from the rules case into the disciplinary case, the same with exhibits.

Have you folks worked out a way to accomplish that?

MR. SAMPSON: It's been my understanding that if we move to have that done, we could accomplish that, and we will make that motion now. There is nothing in the stipulation to that effect, but I don't know of any objection from Tobi Pam.

MRS. PAM: There is no obligation.

[p. 120] THE HEARING OFFICER: I'm not trying to lead you down the garden path here. I'm trying to save money since, as a result of the emergency, the respondent has had to come all the way back here, and normally would be entitled to have the disciplinary case at least tried in their venue.

Because of the great weight, breadth, depth, et cetera of the exhibits, I would suggest to you that, unless you're going to adopt great hunks of testimony, it might be appropriate simply to give me new copies for purposes of this case.

I would remind you of the prior ruling that – two prior rulings – first, that no rule can be invalidated in the process of the 120.57(1) disciplinary hearing. Consequently, nothing in this case will relate back to the challenge to the holding out rule. And, although I see that you folks tend or want to include a lot of concerning constitutional issues, the application of the other rule 21A-24.001(1)(g) in this case, I cannot invalidate that rule in this proceeding.

Both of those rules have previously been made. I make them again, and remind you of them for purposes of this hearing. Are there any questions with regard to those rules?

[p. 121] MR. SAMPSON: No.

MRS. PAM: No.

THE HEARING OFFICER: Any other motions, or anything else that needs to be taken up with regard to that status? Very well.

The rule has been imposed. What I will do is I will ask that each of you will name the witnesses for me that are here that you are going to call. Then I will explain the rule to them, swear or affirm them, and allow them to go out and wait. Petitioners witnesses?

MRS. PAM: Louis Dooner, Elise Rice, Martha Willis.

THE HEARING OFFICER: Respondent?

MR. SAMPSON: Robert Goss G-O-S-S, Silvia Ibanez, Martha Willis. We may handle Mrs. Willis totally on our cross examination, and we won't need to call her at other portions –

THE HEARING OFFICER: Unless there's some objection to doing it out of order that way, that's perfectly acceptable.

MR. SAMPSON: Okay.

THE HEARING OFFICER: Mr. Dooner, Elise Rice, Martha Willis, Mr. Goss, Mrs. Ibanez, Mrs. Willis again. Very well, folks, you all have probably [p. 122] testified in enough hearings that you've heard this explanation before. There is no intent to talk down to anybody, only to make it very clear.

The rules of evidence, rules of civil procedure provide for what is called the invocation of the rule; sequestration. The earliest that anybody knows that this has ever been applied is in the Apocryphal to the Bible, and all that basically means is the opportunity for each witness to testify to his, or her own truth separate and apart from all other witnesses.

Now, in order to do this under the civil rules, it's necessary for one of the attorneys to invoke the rule. In this case, Mr. Sampson has chosen to do so. That is his absolute right, and by that neither he nor Mrs. Pam, nor I, nor anybody else involved in this hearing is trying to keep you somehow or another locked away in a closet. But, this is an absolute right and it will be imposed in this instance.

In a minute, I will ask you to either swear or affirm to tell the truth in this proceeding. After you have been sworn or affirmed, and you may say either under the law of Florida, we will ask you to wait in the witness room, not discuss this case with anyone except the attorneys for either side; not with [p. 123] any other witness, not with anyone else that comes in and talks to you about the case. You're not to discuss it. That means you don't talk about it. That means you don't let anyone else talk to you about it.

I will try to make this as convenient as possible for everyone. And as each witness testifies, I will ask Counsel if that witness may be excused to go about his or her business because I recognize that this is of greater importance to the litigants than it is necessarily to the witnesses.

But, if that doesn't happen, and if it's necessary for Counsel to ask you to stay on, don't hold it against them, because this is one of the due process rights that each of these folks, the agency and the respondent, are entitled to. We won't take more than this day, I feel reasonably certain, Counsel has assured me of that.

I'd like you to be as comfortable as possible. There are coke machines and other facilities available out there. So, we'll hope that you'll be as comfortable as possible. Just stay where they can get a hold of you and this will go a little bit faster.

If the folks who I have called; Mr. Dooner, Ms. [p. 124] Rice, Mrs. Willis, Mr. Goss, Mrs. Ibanez please raise your right hand. Do you swear that the testimony that you're about to give in this cause, do you swear or affirm,

that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth.

(Whereupon, the witnesses answered in the affirmative.)

THE HEARING OFFICER: Very well, you are now excused to the other room, everyone except Mrs. Willis and Mrs. Ibanez. Does anyone wish to have oral opening?

MR. SAMPSON: No.

MRS. PAM: No.

THE HEARING OFFICER: Very well. The ball's in your park, Mrs. Pam.

MRS. PAM: Okay. I'll call Louis Dooner.

THE HEARING OFFICER: Very well, if you'll ask him to step back in. Mr. Dooner, if you'd take the hot seat up here. Mr. Dooner, you have previously sworn or affirmed to tell the truth and now it's appropriate for Counsel to inquire.

DIRECT EXAMINATION

BY MRS. PAM:

Q. Please state your name for the record.

[p. 125] A. Louis W. Dooner, D-O-O-N-E-R – L-O-U-I-S.

Q. Can you please give us a brief background of your education and experience?

A. Graduated from the University of Florida in 1953 with a Bachelors Degree in Accounting. Went to work for

an international accounting firm for four years, then a year in private accounting, and the rest of the time in public accounting. I resided in Quincy the last 32 years.

Q. Are you licensed by the Florida Board of Accountancy?

A. Yes, I am.

Q. Can you tell us when you were licensed?

A. 1959.

Q. Do you hold a current active license?

A. Yes.

Q. Can you tell us if you are a member of any associations, and, if so, if you held any positions?

A. I'm a member of the Florida Institute of CPA's, the American Institute of CPA's, National Association of State Board of Accountancy. I'm the past President of the Florida Institute of CPA's. I was a member of the Council of the American Institute of CPA's. I served on the Standards Board of the American Institute, currently serving on the Examination Review Board of the National Association of the State Board of Accountancy.

[p. 126] MRS. PAM: At this time, I'd like to tender Mr. Dooner as an expert witness for discovery in the practice of public accountancy in the state of Florida.

MR. SAMPSON: I'm going to object to the tender of Mr. Dooner in that capacity, with all respect to his experience and his background. In the pre-hearing stipulation, the DPR has stipulated that there are no factual issues to be litigated. If Mr. Dooner is being

tendered to opine on the validity and the enforcement in this case of the rules against Mrs. Ibanez, we object to that tender for that portion of the tender. There is no foundation that he knows anything about the basis for the amended administrative complaint in this case.

THE HEARING OFFICER: It seems to me, Mrs. Pam, as if you're asking him to invade the province of the finder of fact, and the person in this case, who is going to have to form the conclusions of law, which is myself. He is not a member of the Board. Now, I don't know that he has ever, from your examination, that he has ever drafted any rules either. Do you wish to make a further tender – further voir dire?

MRS. PAM: Okay.

BY MRS. PAM:

[p. 127] Q. Are you a past member of the Florida Board of Accountancy?

A. Yes, I am.

Q. In that capacity, were you involved in preparing for this?

A. Yes.

Q. Were you involved in reviewing informal opinions of the Board?

A. Yes.

Q. Were you involved in interpreting statutes and rules?

A. Yes.

THE HEARING OFFICER: Same objection, Mr. Sampson?

MR. SAMPSON: Same objection. Let me elaborate on the objection. We're talking about a complaint that's been initiated in 1990 by the DPR, and Mr. Dooner is retired, I believe, from the BOA and he is only under contract as an expert with the DPR. He has no knowledge of the facts pertaining to the amended administrative complaint which is not in dispute from the DPR's point.

I think for him to interpret how the laws are applied is an invasion of your job, Madam Hearing Officer, and we object to the tender on that basis.

[p. 128] THE HEARING OFFICER: I'll accept him as an expert CPA, ma'am, but I don't know that there is anyone who is qualified to interpret the rules and statutes in this proceeding besides myself. Will you accept my accepting him as an expert CPA? I won't accept him as tendered, ma'am.

MRS. PAM: You're accepting him as – I don't understand what you're accepting him as.

THE HEARING OFFICER: I'll accept him to testify as an expert with regard to anything that his license permits him to testify to, which is a Certified Public Accountant. But not specifically to interpret the rules or regulations other than as they are written.

MRS. PAM: Okay.

THE HEARING OFFICER: You may inquire.

BY MRS. PAM:

Q. I show you Petitioners Exhibit 1, which is a copy of the respondent's business card.

THE HEARING OFFICER: Petitioner's 1 for identification. Respondents's business card.

MRS. PAM: Yes.

(Whereupon, the documents referred to were marked as Petitioner's Exhibit No. 1 for identification.)

BY MRS. PAM:

[p. 129] Q. From looking at this business card, can you tell us whether the respondent is involved in the practice of public accounting.

A. Yes.

Q. Yes, she is?

A. She is involved in the practice of public accounting.

Q. Can you tell us how you reach that conclusion?

MR. SAMPSON: Objection. This goes to the exact thing we objected to in the tender. He is opining on whether or not that business card constitutes a violation of the rules in question.

THE HEARING OFFICER: Overruled.

MR. SAMPSON: You can answer the question.

THE WITNESS: Appending the CPA to her name says she's in the practice of public accounting.

BY MRS. PAM:

Q. Can you elaborate on that, please?

A. She is telling the public that she is available and offering to perform services that CPA's normally perform.

MRS. PAM: I have no further questions.

THE HEARING OFFICER: Do you wish to move this in evidence?

MRS. PAM: Yes, please.

[p. 130] THE HEARING OFFICER: This is a stipulated exhibit, isn't it, Mr. Sampson?

MR. SAMPSON: Yes.

THE HEARING OFFICER: It is admitted without objection. You may inquire.

(Whereupon, Petitioner's Exhibit No. 1 was received into evidence.)

MR. SAMPSON: Thank you.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Mr. Dooner, you've been a CPA since 1959?

A. Yes, sir.

Q. And you are currently retired, is that correct?

A. I am partially retired from active practice, yes, sir.

Q. That's not like being partially pregnant, you can be partially retired?

A. I hope so. I have been for five years.

Q. You do consultation work for the DPR?

A. Yes, sir.

Q. Are you compensated for that work?

A. Yes, I am.

Q. What are the terms of your engagement for this case?

A. For this case?

[p. 131] Q. Consulting work you're doing on the Ibanez matter.

A. Under the normal – my ordinary consulting contract, paid at the rate of $75 an hour.

Q. Now, you have indicated, looking at the business card exhibit, which is Petitioner's Exhibit 1, that from that you can discern that Mrs. Ibanez is practicing public accounting, is that fair to say?

A. Yes, sir.

Q. Would you please tell me where on there you are led to believe she is not a lawyer, or not practicing law?

A. I am not led to believe that she is not a lawyer. It says law offices.

Q. It says that pretty clearly, doesn't it – on the card?

A. Uh-huh.

Q. Yet you're indicating that you believe the public would believe she's practicing public accounting from that business card. Where on the card do you see that –

A. The card says –

Q. – indication to the public that she's practicing public accounting?

A. The card says she's a CPA.

Q. Where precisely did it say that?

[p. 132] A. Following her name.

Q. Silvia Ibanez JD, CPA, CFP.

A. Right.

Q. What does the JD mean to you?

A. To me?

Q. Yes.

A. That she has a Juris Doctrate [sic] Degree.

Q. What does the CFP mean to you?

A. I believe it means Certified Financial Planner.

Q. Would you continue down the card. What does the next line read?

A. Law offices.

Q. Have you done any review or study – do you have any empirical data to believe that the public would believe Mrs. Ibanez is practicing public accounting?

A. Do I have empirical data that the public believes that she is practicing public accounting?

Q. Yes.

A. Are you asking me have I personally done a survey of the public and asked them that?

Q. Let me ask you that question. I'm asking a more general question but let me start with that one. Have you done any review in Mrs. Ibanez's case of what the public believes when they see that card about the nature of her practice?

[p. 133] A. No, I have not. I've never seen such a survey.

Q. You haven't performed one, and you haven't reviewed such a survey?

A. No.

Q. Have you seen any data about what is in the minds of the public when they see Mrs. Ibanez's business card?

A. Any data?

Q. With regard to the practice that she's engaged in.

A. No, I have not.

Q. Let me ask you more generally, not from Mrs. Ibanez's case, but in general. Have you seen any data about the effect of using the letters "CPA" in one's business card by an attorney, or any attorney?

A. The inclusion of data, no.

Q. Have you visited Mrs. Ibanez's law offices?

A. No, I have not.

Q. On the issue of empirical data about the public and what's in the minds of the public, you said you haven't seen any studies or surveys done. Do you know if any exist in the files of the Board of Accountancy or with Ms. Elise Rice about what the public believes when they see a business card with the letters CPA on it?

A. No.

[p. 134] Q. During your tenure with the Board of Accountancy, have you ever seen any kind of data about the use of CPA in advertising and the effect on the public?

A. No.

MR. SAMPSON: No other questions.

THE HEARING OFFICER: Redirect?

MRS. PAM: Nothing further.

THE HEARING OFFICER: Thank you, Mr. Dooner. What do you folks want to do with this witness? Would you like him to be excused or do you want him to stay?

MRS. PAM: I want him to stay.

THE HEARING OFFICER: Okay. Mr. Dooner, you heard it. If you wait out there until the next round. Who is your next witness, please.

MRS. PAM: Elise Rice.

THE HEARING OFFICER: Will you call her? Maybe Mr. Dooner could just send her in. Mr. Rice has previously been sworn, you may inquire.

WHEREUPON,

ELISE RICE,

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. PAM:

[p. 135] Q. State your name for the record.

A. Elise Rice.

Q. And your place of employment.

A. Department of Professional Regulation.

Q. Can you tell us a little bit about your educational background?

A. I graduated from high school and went to one year of vocational school and got an accounting diploma.

Q. Do you have any further education?

A. No.

Q. I show you Petitioner's Exhibit 1, which is the respondent's business card, can you please tell me for what services you think you can go to the respondent?

A. I would say she was a Certified Public Accountant.

Q. Would you think by looking at that card, you could go to her for any other services?

A. It has law offices on there, I don't know. You know, I wouldn't think she was a lawyer. I don't know what CFP is.

MRS. PAM: No further questions.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Good morning, Ms. Rice. I'm Michael Sampson representing Silvia Ibanez, the person whose business card [p. 136] you just read.

A. Okay.

Q. You've indicated that you believe she is a CPA, looking at the business card.

A. Yes.

Q. You wouldn't think she was a lawyer, is that what you said?

A. From looking at this, no.

Q. Do you see on the card the word "law offices"?

A. Yes.

Q. What does that indicate to you?

A. That she works at law offices.

Q. Do you know what the letters JD mean?

A. No.

Q. If you were to engage the services of any nature of Mrs. Ibanez, just having seen this business card, what efforts would you make to contact her to see whether she would handle the work you wanted to engage her for?

A. I'm not sure I understand what you're – if I wanted her for something other than a public accountant?

Q. For any service.

A. I would call to see what she was.

Q. Would you tell her what it was you wanted to engage her for, the kind of work you wanted her to do, and ask whether she could do that work?

[p. 137] A. Possibly. In the first place, if I didn't know what she was, I wouldn't be calling to find out. I'm not sure if I'm answering –

Q. I'm not sure if I understand your answer and I do want to understand it. Suppose you had this business card and that's all you had. And you wanted to engage her for either accounting or law services. Who would you determine whether or not she could handle the work you wanted to engage her for?

A. I would have to call the number on there and find out.

Q. What would you ask? I want you to assume something before you answer that question. I want you to assume, when you call that number, the person who answers the phone says "law offices." What is you first question to that person?

A. Is she a public accountant or is she an attorney?

Q. Okay. Suppose the person says she's an attorney; her practice is she's engaged in the law practice.

A: Then I would probably ask why does she have CPA on her business card.

Q. I want you to assume that you're still talking to the receptionist at this point, and the receptionist [p. 138]

tells you that it's true that she's a CPA. How do you use that information that when you learn that she is, indeed, a CPA but her practice is a law practice?

A. How would I use that information?

Q. Yes.

A. I'm really not sure, I mean –

Q. Would you still be confused about whether she was engaged in the practice of law or the practice of public accounting?

A. Well, looking at her business card, you would think she's doing both. Then once you find out that she is, yes, indeed, an attorney, I would say she's being an attorney and a certified public accountant based on her business card.

Q. This is after you've made the phone call?

A. Right.

Q. You would still believe she's engaged in both?

A. Yes.

Q. Let's say that the receptionist – I want you to assume you have some accounting work that you want done by a CPA.

A. Okay.

Q. And you set up an appointment with the receptionist for tomorrow, Wednesday, at 4 p.m., and they tell you where the offices are in Winter Haven, Florida; [p. 139] and you arrive, and the first thing you see when you get there is this sign. I want you to assume that is a photograph of the sign outside Mrs. Ibanez's offices.

A. Okay.

Q. Would you read what you see on the sign?

A. Law offices of Julae and Stuart, Attorneys, PA; Lawrence E. Stuart, Jr., Attorney at Law; Silvia S. Ibanez PA, Attorney at Law.

Q. When you see that sign, and you've set up an appointment to have some accounting work done by a CPA, does that make you nervous seeing that sign that maybe you picked the wrong person?

A. It would make me think I was at the wrong location.

Q. Would it make you think you were at a law office?

A. Seeing that sign, yes.

Q. I want you to next assume that you somehow missed the sign – that sign there.

THE HEARING OFFICER: Do these need to be marked for identification?

MR. SAMPSON: We have three photographs. I would like to mark them as Ibanez. Two photographs, one of the sign and the other one of the next –

THE HEARING OFFICER: Has Mrs. Pam seen these?

[p. 140] MRS. PAM: I saw one of them.

MR. SAMPSON: I think we left off on the numbering at the rule challenge at ten, unless you want to just start up with Ibanez.

THE HEARING OFFICER: We have Petitioner's 1 in this cause and these will be Respondent's.

MR. SAMPSON: Composite Exhibit 1 consisting of two photographs.

THE HEARING OFFICER: Now, you want these as Respondent's Exhibit 1-A and Respondent's Exhibit 1-B, is that right?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Respondent's Exhibit 1-A is a photo of a large free-standing sign, Respondent's 1-B is a photo of a mounted sign.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 1-A and Respondent's Exhibit 1-B for identification.)

BY MR. SAMPSON:

Q. I hand you what has been marked as Respondent's 1-B. The question I was going to ask you is: You have seen the first sign that's been marked 1-A, the large sign outside the office, and you see that and you begin to wonder now; you walk up the walkway, and the next thing you see is that smaller sign. What does that sign say?

[p. 141] A. Law offices.

Q. Do you see anywhere in the vicinity a reference to public accounting offices or certified public accountants?

A. No, not in the picture.

Q. At the time you see this sign, what is your belief about the nature of Mrs. Ibanez's practice?

A. Well, if you're just going by the signs, you would say law offices, she's an attorney, she's a lawyer.

Q. I want you to go by everything you've seen up to that point and everything you've heard when you made the initial contact on the phone. You've seen the business card, you made the phone call, you made the appointment and driven up now; you've seen the big sign, you walk up the walkway, and you see the smaller sign. What do you think now about Mrs. Ibanez's practice?

A. Well, going back to the business card, you would still say she's a certified public accountant and an attorney.

Q. You are employed by DPR, correct?

A. Correct.

Q. Have you had discussions with Mrs. Pam before today's hearing?

A. No. She asked me if I would be a witness.

Q. What did she provide you, if anything, in [p. 142] connection with your being a witness in this case?

A. She showed me a telephone ad – a phone book ad is all.

Q. What did she tell you about the case?

A. She told me nothing. She asked me if I knew what CPA stood for, and yes, I did: Certified Public Accountant. And then there were some other letters in

the ad, but I told her I didn't know what they were, and I still don't know what they are.

Q. Was the yellow page's ad under the attorney section, do you recall?

A. Yes, it was.

Q. You hadn't seen the business card before today?

A. No. I only talked to her just that one time.

Q. Did Mrs. Pam explain why she was selecting you to appear as a witness in the case?

A. No. Only as an uninformed person.

Q. Do you believe you're uninformed?

A. As far as knowing – yes.

Q. The letters CPA, what do they mean to you?

A. Certified Public Accountant.

Q. Is it valuable or beneficial for you to know that someone has gone through all the examination processes they need to go through to get the CPA license; does that have any benefit for you knowing that if you had [p. 143] to choose among different attorneys, one has a CPA license, the other doesn't, and you're coming to them for law work relating to some financial matter or something involving a lot of numbers? Is it helpful for you to know that they passed that CPA exam?

A. Probably not.

Q. What is that?

A. Well, if I'm going to them for legal services –

Q. Maybe I'm not making myself very clear here. Let's say there's a type of service that can be done by an accountant, CPA, who is not a lawyer; can be done by a lawyer who is not a CPA, can be done by a Certified Financial Planner who is neither a lawyer nor a CPA, or can be done by any combination of those credentials. Wouldn't you want a person with more credentials than fewer credentials to do the work that can be done by any of them alone?

A. Possibly.

Q. Besides Mrs. Pam approaching you for being a witness today, have you had discussions about the way your testimony might go today at the hearing?

A. No.

Q. Have you been coached at all on the answers to give?

A. No.

[p. 144] MR. SAMPSON: No other questions.

THE HEARING OFFICER: Redirect?

MRS. PAM: Nothing further.

THE HEARING OFFICER: May this witness be excused or do you want her to remain?

MRS. PAM: She may be excused.

MR. SAMPSON: I would like to introduce into evidence Respondent's Exhibits 1-A and 1-B.

THE HEARING OFFICER: Just a minute. Miss Rice. Do you wish to hold this witness for any reason?

MR. SAMPSON: No.

THE HEARING OFFICER: You are excused, Ms. Rice. But you will not discuss this case until you're informed by either Counsel, or myself, that it has concluded. Thank you for your attendance. Any objection to Respondent's Exhibit 1-A and 1-B, Mrs. Pam?

MRS. PAM: No.

THE HEARING OFFICER: Okay. They go in without objection. Your next witness, please ma'am.

(Whereupon, Respondent's Exhibit No. 1-A and 1-B were received into evidence.)

MRS. PAM: Martha Willis.

THE HEARING OFFICER: You've been sworn, Mrs. Willis. You may inquire Mrs. Pam.

[p. 145] WHEREUPON,

MARTHA P. WILLIS,

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. PAM:

Q. Would you state your name for the record.

A. Martha P. Willis.

Q. And your place of employment.

A. Department of Professional Regulation, Florida Board of Accountancy.

Q. How long have you been in that position?

A. Nine years.

Q. I show you Petitioner's Exhibit 2, and ask you if you recognize these?

THE HEARING OFFICER: Petitioner's 2 for identification. What may I call this, Mrs. Pam?

(Whereupon, the document referred to were marked for identification as Petitioner's Exhibit 2.)

MRS. PAM: It's a composite exhibit made up of a number of different letters to the Board.

THE HEARING OFFICER: Composite informal opinions.

MR. SAMPSON: We haven't seen them. They are not on the exhibit list. We are making a motion for [p. 146] official recognition. We would like a little time to look at it.

THE HEARING OFFICER: Very well. Let's let the respondent look at them before you inquire further. Do I understand the representation of everybody that these are different than the others, than those that you've agreed to?

MRS. PAM: It was my understanding that these were listed as exhibits.

THE HEARING OFFICER: Sometimes these pre-hearing listings get a little vague. If you would tender these to respondent and let Counsel look at them.

MRS. IBANEZ: Okay. If I may speak to that issue. It has a generic category, and we had requested

opinions regarding the CFP. And, so, we have them under public records at request, but we don't have all of these. Some are new to us. We didn't get some of these. If we may have one minute that would be fine.

THE HEARING OFFICER: You're free to object. I just want you to have an opportunity to look at them.

MRS. IBANEZ: That opportunity will be sufficient, Madam Hearing Officer.

THE HEARING OFFICER: Has the respondent had [p. 147] enough time to look at these?

MR. SAMPSON: No objection to their being officially recognized, if that's what the motion was.

THE HEARING OFFICER: Well, I don't think we are at that stage yet. I think the question is: Does Mrs. Willis recognize them, and she has answered yes, she does. Mrs. Pam, you may proceed.

BY MRS. PAM:

Q. Can you tell us what they are, please?

A. They're all informal opinions which were ratified by the Board of Accountancy.

Q. On any particular subject?

A. Yes, dealing with the specialization designations.

Q. Has the Board opined on the Certified Financial Planner designation?

A. Yes, it has.

Q. And what is their opinion?

A. That it is a specialty designation.

Q. Has the Board approved the use of this specialty designation?

A. No, they have not.

Q. Has this been their ruling within the past ten years?

A. Well, since I've been there – the nine years [p. 148] that I have been there. These opinions start in 1982 and have been consistent since that time.

Q. Is that still their opinion today?

A. Yes.

Q. Do you know why they have opined that CFP designation as a specialty?

A. No, I don't.

MRS. PAM: At this time I'd like to move Petitioner's Exhibit 2 into evidence.

MR. SAMPSON: No objection.

THE HEARING OFFICER: If it is a composite, let's be sure it is all together. This one is, and is admitted without objection.

(Whereupon, Petitioner's Exhibit No. 2 were received into evidence.)

THE HEARING OFFICER: You tender the witness, Mrs. Pam?

MRS. PAM: Yes.

THE HEARING OFFICER: Cross?

MR. SAMPSON: Just for the record, for this composite, so we know we have everything, – it's not a stapled thing – can we just go through by the date and the name maybe of the person who is inquiring.

THE HEARING OFFICER: Why don't you simply compare your copy with Petitioner's 2, and if there [p. 149] is any question or any problem, feel free to object.

MRS. IBANEZ: There is about 20 loose sheets, Madam Hearing Officer, there's really only six licensees. Some of them can be clipped. Our request is just to name Nichols, – the last name – and to say Nichols. Just list the six names and the six opinions for clarification.

THE HEARING OFFICER: Well, I'm certain we could do it that way, but if they are stapled together and the copy that's being admitted, won't that cover it?

MRS. IBANEZ: Well, if it doesn't come apart, it will cover it, yes, I agree. It's just a thought.

THE HEARING OFFICER: For further clarification, Petitioner's 2 constitutes 16 pages related to six opinions. Is that the parties' representation?

MRS. PAM: Yes.

THE HEARING OFFICER: Very well.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Mrs. Willis, I'm Michael Sampson, we met before, I have a couple of questions, or more. Since the

years you've been Executive Director at the Board of Accountancy, you've had to answer many questions in writing for licensees, correct?

A. Yes.

[p. 150] Q. Whenever you answered in writing, you were giving an informal opinion on the matter they were inquiring about.

A. Correct.

Q. It wasn't a legal opinion you were giving them.

A. No.

Q. What kind of opinion would you say that was?

A. It's an informal opinion, which is then given to the Board at their next meeting for them to either ratify or modify. And, so, the opinion very clearly states that it's not binding on the Board until such time as they have read it and taken action on it.

Q. In your informal opinions, including the ones that you've looked at as Petitioner's Composite 2, would you cite certain rules that you felt applied in the particular matter that they inquired about?

A. Would I cite them?

Q. Yes, in the informal opinion you give, would you cite provisions of the statutes or certain rules that you felt applied?

A. Usually I do, yes.

Q. Did you ever tell a CPA licensee in writing that you're not an attorney; and, therefore, could not render any legal opinion to them?

A. No, I don't believe I've done that.

[p. 151] Q. On all the various opinions pertaining to CFP and CPA, using the CPA designation, that we call the holding out of CPA – in all those various opinions how many – and you can give it by percentage if it's easier – how many would you way were ratified, word for word, by the Board of Accountancy?

A. Well, it's just a guess, but probably – just specifically with related to CFP and CPA?

Q. Yes.

A. Somewhere around 95 percent, probably.

Q. In the vast majority of cases they ratified the opinion you've given, correct?

A. Well, I think if it's not specifically on this issue, it might be a little bit lower than that.

Q. No, just on this issue.

A. On that issue, in the vast majority, that's correct. They would ratify it.

Q. Are you aware of any complaint against Mrs. Ibanez by any member of the public for having used the CFP credential in her advertising?

A. Well, I'm aware, of course, of the case we're talking about today. I don't know who filed the complaint in that case.

Q. Was there a complaint filed in the case?

A. I don't know. I'm not the complaints analyst.

[p. 152] Q. Have you seen a complaint filed in the Ibanez matter –

A. No.

Q. – with regard to the CFP designation?

A. No.

Q. Have you ever seen any complaint against any person who uses the CFP credential in advertising?

A. I believe so.

Q. Was that from a member of the public – "the uninformed public" as we've called them?

A. I receive complaints in the mail anonymously. I assume they're from the public when they just come in the mail and there's an advertisement or something with a circle around it. I don't know if it's from a member of the profession or the public or where. I do receive complaints that way.

Q. You have no idea whether that's from a member of the public?

A. Presumably, it is.

Q. Why would you presume it is, or isn't?

A. Who else would it be from?

Q. For example, CPA.

A. They're a member of the professions, they're also a member of the public.

Q. Let's talk about the people who aren't CPA's,

[p. 153] who are in competition with CFP's for certain markets for types of services that are handled by both CPA's and CFP's; have you received or seen any complaints from those who are not CPA's pertaining to the use of the CFP or CPA credential?

A. I really can't recall receiving a complaint from a member of the public that was not a CPA other than anonymous complaints. I have no idea who they came from.

Q. Thank you. Have you, yourself, conducted any study of the public's impression or interpretation of the letter CFP?

A. No, I have not.

Q. What is it that leads you to believe the public infers that the letter CFP implies a specialty?

A. I don't believe I said that I've been lead to believe that.

Q. Was that the Board of Accountancy that lead you to believe that?

A. No. I don't know that anybody lead me to believe that.

Q. Is the first opinion pertaining to the CFP designation the top of the pile there?

A. Mr. Pierson?

Q. Let's look at Exhibit 2 for petitioner. Mr. Carl Pierson.

[p. 154] A. Right.

Q. You recall that being the first time you opined or the board of Accountancy opined about the use of CFP designation?

A. No. These opinions began when I started work for the Board. I'm sure that there were opinions prior to 1982 issued by other executive directors. Whether or not they cover that specific item, I don't know, so I can't say that it's the first time. This is just the opinions since 1982, since I started to work there.

Q. At the time that you signed this July 8th, '82 letter to Mr. Pierson –

A. Uh-huh.

Q. – had any study been done to your knowledge about how the public views the letter CFP?

A. Not to my knowledge.

Q. And what that means to the public?

A. No.

Q. What those letters imply to the public?

A. No.

Q. I'm going to ask this in a different way, but let me ask. Do you know of no actual or perspective client of Mrs. Ibanez who has filed a complaint against her for using CPA or CFP?

A. No, I don't know that.

[p. 155] Q. Do you know how the CFP designation came to be viewed by the Board of Accountancy or yourself as a designation of the specialty of public accounting?

A. No, I don't know how.

Q. Is it true that Mrs. Ibanez is a CFP?

A. I don't know that.

Q. Do you know whether that her using CFP misleads anybody?

A. I don't know.

Q. I don't know if this is in your packet or not, it's another opinion I want you to refer to. We'll just have this marked separately for identification as Respondent's Exhibit 2. And it has been officially recognized, I understand, by the FICPA as motion from the other case.

THE HEARING OFFICER: Respondent's 2, A 12/9/87 response and 11/30/87 inquiry – McGruther. Good enough, Mr. Sampson?

MR. SAMPSON: Yes.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 2 for identification.)

BY MR. SAMPSON:

Q. I hand you now what has been marked as Respondent's Exhibit 2, and ask whether you can identify that informal opinion that's been ratified?

[p. 156] A. Yes.

Q. That pertains to the use of the CFP designation, does it not?

A. Yes, it does.

Q. To your knowledge, is that included in the Petitioner's Exhibit 2?

A. No, it is not.

Q. Mrs. Willis, was an inquiry, apparently by Ms. Judith McGruther, about whether she could hang her CFP diploma in her office, do you recall your opinion?

A. Yes. My opinion was that she could do that.

Q. She also inquired whether she could use the CFP description on her resume when she was stating her biographical information pertaining to her education. Do you recall whether you opined on whether she could use that CFP?

A. Yes, I do.

Q. And what was that opinion?

A. That she could.

Q. That opinion was ratified, correct, by the Board of Accountancy on January 26th, '88?

A. Yes.

MR. SAMPSON: No other questions. I move to submit that into evidence at this time.

THE HEARING OFFICER: Any objection?

[p. 157] MRS. PAM: No.

THE HEARING OFFICER: Very well. Respondent's 2 is admitted. Folks, I may be wrong but I make it seven opinions in Petitioner's 2.

MR. SAMPSON: Yes there are seven.

(Whereupon, Respondent's Exhibit No. 2 were received into evidence.)

THE HEARING OFFICER: Very well. I'm going to edit the docket sheet that way. Redirect, Mrs. Pam?

MRS. PAM: I don't have a copy of it.

THE HEARING OFFICER: Yes, ma'am. All the exhibits are here.

REDIRECT EXAMINATION

BY MRS. PAM:

Q. In looking at this letter, does it not also state that she cannot use the CPA designation in conjunction with the CFP designation?

A. Yes, it does.

Q. And what is the reason for that?

A. Because it's a specialty designation and the rules prohibit it.

MRS. PAM: Nothing further.

THE HEARING OFFICER: We ll let Mrs. Willis get more comfortable in the same seat. Next witness.

MRS. PAM: Nothing further. The petitioner [p. 158] rests.

THE HEARING OFFICER: Before you do that, Mrs. Pam, you folks have listed a number of exhibits by agreement but they haven't been moved in. Is it your intent not to do that or are you assuming just because they've been stipulated that there's no objection – they go in automatically? I'm advising you they do not.

MR. SAMPSON: Respondent doesn't assume that they do go in.

MRS. PAM: I'm sorry.

THE HEARING OFFICER: I give you just a minute to think about that, Mrs. Pam. I'm not trying to run your case, but I note that the pre-hearing stip that I got this morning is just slightly different than the one I got last week. So, I just want to be sure you all are on the same wavelength.

MRS. PAM: The only other exhibit that I would have is Petitioner's Exhibit 3, which is a Certificate of License.

THE HEARING OFFICER: Any objection to that?

MR. SAMPSON: No objection.

THE HEARING OFFICER: Very well. Certified copy of license information goes in without objection as Petitioner's 3. That being the case, does Petitioner [p. 159] rest?

(Whereupon, the documents referred to were marked as Petitioner's 3 and received into evidence.)

MRS. PAM: Yes.

THE HEARING OFFICER: Very Well. Respondent.

MR. SAMPSON: Could we take a five minute break?

THE HEARING OFFICER: Sounds good to me. How about 15 minutes. Folks, I think you've been through this one drill; I leave the exhibit list and all the exhibits in one location so you all have access to them.

(Whereupon, a short recess was had.)

THE HEARING OFFICER: Let us be in order. Respondent.

MR. SAMPSON: Respondent at this time moves for a directed verdict. There's been no evidence at all, let alone clear and convincing evidence, that Mrs. Ibanez is in violation of any of the rules or statutes alleged in the amended administrative complaint.

We've heard a little bit of testimony about a business card, coupled with the facts that have been stipulated into evidence. Nothing from all of that amounts to and alleges the elements that they need to prove, in order to establish by clear and convincing [p. 160] evidence, the violations that they've alleged in the amended administrative complaint.

There was Ms. Rice, and her testimony. She is primarily a bellwether of the great uniformed [sic] public out there. She is an employee of the DPR. Even she indicated that it was possible – the use of CPA – that information would be valuable to her. "It was possible," she said.

She indicated that if she went through the chain of events that most people would go through, after she saw the business card, made the phone call, went up the walkway and saw the signs, she would begin to realize that Mrs. Ibanez was a practicing lawyer and not a practicing public accountant.

The whole case boils down to the use of CFP and CPA in advertising, and whether or not that advertising is misleading to anybody. There is no evidence of anybody having been misled, in fact, or that would have

been misled or could be misled. The only evidence is Ms. Rice's testimony and that, we contend is woefully inadequate. We at this time move for a directed verdict.

THE HEARING OFFICER: Response, Mrs. Pam?

MRS. PAM: I have to agree that the whole case boils down to the use of the CPA, CFP designations. [p. 161] But there are opinions in evidence from the Board that have opined, specifically, on the subject that it is a violation of the advertising rule.

The advertising rule, specifically, says that if you use it that is in and of itself misleading and deceptive.

THE HEARING OFFICER: That's your argument?

MRS. PAM: Yes.

THE HEARING OFFICER: The very fact that there is a pending rule challenge would lead me to believe that this motion for directed verdict, which I assume is really a motion for summary of recommended order and I will take it in that light, could not appropriately be granted at this time. But, even if it could, under our rules, the very fact that I have to enter a recommended order would mean that it is necessary for me to do that in the form of a recommended order.

Consequently, I will deny it at this time for revisitation in the course of the recommended order. I will preserve that you within the recommended order, and if you choose not to put on a case at this time, I will understand that; however, I will recommend that you proceed.

MR. SAMPSON: We will proceed. Thank you. We [p. 162] call as our first witness. Mr. Robert Goss.

THE HEARING OFFICER: Let me suggest something else to you folks. It's about four minutes before the lunch hour – would it be convenience or would anybody be prejudiced by resuming at one o'clock? Or if you have any reason to proceed at this time, I'll certainly go right ahead at this time. I don't want anybody to do without lunch, and I recognize we have some health problems here.

MR. SAMPSON: That's fine.

THE HEARING OFFICER: All right. We'll resume at one o'clock.

(Whereupon, a lunch recess was had at 12:00 p.m. and the proceedings resumed at 1:05 p.m.)

THE HEARING OFFICER: Let's be in order. We are ready for respondent's case in chief. Mr. Sampson.

MR. SAMPSON: Respondent calls Robert Goss.

THE HEARING OFFICER: Have a seat right here, Mr. Goss. Mr. Goss has been previously sworn. You may inquire.

MR. SAMPSON: Thank you.

WHEREUPON,

ROBERT GOSS,

after having been previously sworn, was examined and testified as follows:

[p. 163] DIRECT EXAMINATION

BY MR. SAMPSON:

Q. Mr. Goss, I'm Michael Sampson representing Silvia Ibanez in this matter. What is your full name?

A. Robert P. Goss, Jr.

Q. Mr. Goss, with whom are you currently employed.

A. I'm currently Executive Director for the International Board of Standards and Practices for Certified Financial Planner, Inc. It's such a long name, we call it the IBCFP.

Q. I will refer to it as the IBCFP for convenience. Tell me what the IBCFP, does and what you do within the IBCFP.

A. Well, I'm the chief staff officer for the corporation. We are an international certification, standard setting, licensing and displinary [sic] body for those people who either seek to have or to hold the marks Certified Financial Planner, and CFP.

Q. Are those two different things; Certified Financial Planner and CFP, or is CFP merely an abbreviation of Certified Financial Planner?

A. They are two different marks. The CFP does mean Certified Financial Planner, but we had to register them separately.

Q. Are those both registered trademarks?

[p. 164] A. They are registered marks, yes. They also have common law protection.

Q. Are those exclusively within the IBCFP's jurisdiction to control?

A. Yes, sir. We own the marks, and we have an obligation to protect them as a result of that ownership.

Q. When were these marks first originated? When was the first time the CFP or Certified Financial Planner mark came into being?

A. We received the marks from the College for Financial Planning in 1986. We, as an organization, were formed in 1985. The college first granted that mark to individuals in 1973. The registration occured [sic] shortly thereafter in 1973, '74, '75 period: somewhere thereabouts.

Q. Would you give me some information about your membership? How may CFP's and Certified Financial Planners are there in the United States today?

A. Counselor, we are not a membership organization. There is a professional membership association called the Institute of Certified Financial Planners, which is the professional membership for those people who hold that mark, much like the American Bar Association is to the professional associations for licensing attorneys and so forth, but we are not a membership organization.

We have licensees; we license individuals on an [p. 165] annual basis to use the mark and we have an annual registration process. We currently have in 1991, little more than 22,000 individuals within the United States using that mark.

Q. Do you have any knowledge of how many of those CFP's who are using the mark CFP or Certified Financial Planner – how many of those are CPA's?

A. Yes we do. Of the – there are just a little more than 3,400 who have indicated on their annual registration form to us that they are also certified public accountants in one or more states.

Q. Are CFP's and Certified Financial Planners regulated by a code of ethics?

A. Yes. We have a Code of Ethics and Standards of Practice. It's a combination that was instituted in 1986 with our getting the mark from the college, and that's been in place since that time; but yes, there is.

Q. I'd like to hand you what will be marked for identification as Respondent's exhibit 3.

THE HEARING OFFICER: Respondent's 3. What do you call this?

MR. SAMPSON: IBCFP Code of Ethics and Standards.

THE HEARING OFFICER: Very well. For identification Respondent's 3, IBCFP Code of Ethics [p. 166] and Standards.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 3 for identification.)

MR. SAMPSON: Before I show it to you, I'd like to hand it to Mrs. Pam.

BY MR. SAMPSON:

Q. Mr. Goss, please take a look at what's been marked as Respondent's Exhibit 3. Can you identify that document?

A. Yes. It is the recent edition of our publication by this very name.

Q. Does that publication accurately set forth the Code of Ethics you were referring to?

A. It's current as of today, that's correct.

Q. Are there any ethical provisions regarding the use of the CFP mark?

A. Yes, there is. In code VI B2 there's a provision on the use of the CFP mark with or without other degrees in professional designations and marks. It indicates –

Q. Go ahead and read that, if you would. I'm sorry for interrupting you.

A. It indicates in 2 A that all applicable guidelines and regulations by us regarding use of the marks CFP and Certified Financial shall be strictly [p. 167] followed by our licensees. And then B, indicating the use of the designations.

It indicates that the CFP designees who has attained a CLU – that's Chartered Life Underwriter – CPA, JD or MBA degree or other designations, may list them after the CFP designee's name in order of personal preference in advertising, letterhead stationery and business cards. Then it goes on to say the Investment Advisers Act of 1940 requires registration of investment advisers with the Securities and Exchange Commission.

The CFP designees may disclose their status as registered investment advisers to clients. Under present standards of acceptable business conduct, it is proper to use Registered Investment Adviser if the CFP designee is registered individually; however, RIA or R.I.A. following a CFP designee's name in advertising, letterhead stationery and business cards may be misleading and is not permitted, so we do not permit that one. Others we do permit at the discretion of the licensee.

Q. Does the CFP credential state, or imply, that the CFP has received formal recognition in any aspect of the practice of public accountants?

A. No sir.

Q. What is the basis for your statement that it does not?

[p. 168] A. The designation indicates that somebody has met requirements in terms of education, in terms of examination, in terms of experience and in terms of ethics. And, if they are a continuing licensee, whether if they met post-certification requirements with one or more of those items as well, it does not have a relationship to public accountancy.

We test, Counselor, on the basis of a job analysis, which has been performed some years ago in 1987 for what constitutes the work of a Certified Financial Planner and financial planning in general. And, as a result of that rather technical exercise, we have put into place an examination process which tests for that content to mean – or body of knowledge as they call it – and we use a whole

series of academics and other practitioners to continue to keep that examination and other things in place.

It's a broad based examination in the areas of Fundamentals for Financial Planning, Risk Management, Investment Planning, Tax Planning, Estate Planning, and Fringe Benefit and Retirement Planning.

Q. Must you be a CPA in order to be a CFP?

A. No, sir. In fact, the field of financial planning as we know it today, did not evolve out of accountancy. But rather, for better or for worse, evolved [p. 169] out of the insurance – and to a lesser extent – to the security's field late in 1960's and during the early '70s.

It was really developed from the position of agents and others not wishing to be in the position of having to sell a product, but to try to serve the interests and needs of the clients or customers or people that they work with. And yet the strictures at the time in place almost require that they do so. And, so this whole movement was begun.

It was a society for financial counseling, formed in 1969 and since that time has evolved into what we have today for financial planning.

Q. Now, all kinds of different people can do financial planning, is that correct?

A. Well, that's right.

Q. You have APFS – I'm going to read out some letters and tell me whether these people, first of all, what the letters mean; and, second, whether they do financial planning. APFS, does that have any meaning to you?

A. Yes, It's Accredited Personal Financial Specialist. It's a designation offered through the American Institute of Certified Public Accountants. It's a designation that's relatively recent – over the last several years – and it indicates that somebody may be a [p. 170] specialist in sofaras [sic] they've met the requirements for that body in terms of public accountancy or public accounting or that area.

Q. So, the public accountants have their own designation for certified – excuse me – for financial planners?

A. They have recently developed that for CPA's and it's a voluntary process.

Q. What do the letters CEA mean to you?

A. CEA?

Q. If any.

A. That doesn't ring a bell with me, I'm sorry.

Q. What about CHFC?

A. Yes, Chartered Financial Consultant. It's a proprietary credential offered by the American College out of Bryn Mawr, Pennsylvania. They've been in existence for many, many, many years. They're backed by the insurance industry, and that credential began well after our own as well, in and about 1983 period of time.

At first it meant that somebody had to take another three courses beyond the Chartered Life Underwriters – CLU credential – from that same institution. Today, at the current time, people can pursue that designation separately – do not have to first go to Chartered Life Underwriter.

[p. 171] It is roughly equivalent to the educational component that we require for people to become Certified Financial Planner, licensed with us, but it doesn't have the market penetration and a lot of things as the CFP – Certified Financial Planner has. It's a good quality educational program, however, it does have a tinge of life insurance expectations on it.

Q. The next one is CLU.

A. Chartered Life Underwriter, it's been in existence for many, many decades. Again, offered solely by the American College out of Bryn Mawr, Pennsylvania.

Q. They can do financial planning at CLU?

A. Well, there are not a lot of law or regulation directed to financial planning as a body. And so people can call themselves financial planners without having to register as such. I suspect that will change in the years ahead, but currently that is the case.

There are a number of organizations that have taken a formal stance on that of some governmental nature. One is the SCC itself, which indicates that somebody cannot hold out as a financial planner to the public without registering as a Registered Investment Advisor under the 1940 Investment Advisors Act.

Similarly, NASA – North American Securities Administrators Association has taken a similar position. [p. 172] In fact, released 10-92's and joint release for both of those organizations. The other organization that has taken a position on this is the National Association of Insurance Commissioners, which has developed model

legislation, Counselor, which would prohibit an insurance agent from using the term "financial planner", when, in fact, all they do is sell insurance products.

To do any of those things is misleading to the public, and that's why those are the bodies that have taken that position. Somebody could do financial planning as a CLU but it may be misleading. They, basically, are professional life insurance agents.

Q. Is the ability to use the letter CFP valuable to the person who uses those letters truthfully?

A. Yes. In fact, that's why people voluntarily pursue the certification process with us. I've indicated how many are currently licensed, and we have more than 20,000 students engaged in financial planning courses from anyone of over 40 institutions of higher learning. Either in graduate programs, under-graduate programs or certificate programs.

We have among other things, we register the curricula of institutions of higher learning around the country, including the University of California, Alabama, South Carolina University and many others. So that [p. 173] students going through those programs can sit for our examination and become certified from us. So, obviously, they also believe that it's valuable to the public.

Q. You refer to the public, I have asked you about the value of using the CFP letters to the person who uses them. Now, let me ask you, the next step is, is there any value, in your opinion, to the public in seeing those letters; is there any information conveyed to the public?

A. I think it's a high value to the public. We get hundreds of phone calls every week from the public about these kinds of issues. And our whole intent and mission, since we are not a membership association, is to provide a level of assurance to the public about the qualifications of individuals who opt to provide financial planning services.

And, so, the marks have that meaning to those individuals who hold the marks, as well as to the public who seek out somebody who has some specific training background and experience, and certain kinds of ethical canons to follow in the practice of financial planning.

Q. According to the records of the IBCFP, is Mrs. Ibanez an active, currently certified CFP?

A. Mrs. Ibanez, was authorized by us in 1988 to use the marks. She was licensed with us in 1990 and she is currently licensed with us in 1991.

[p. 174] Q. Has the IBCFP ever entered into any arrangement with the Florida Board of Accountancy with regard to the CFP mark?

A. No, sir, we've not.

Q. Has there ever been any assignment, informally or formally, of any portion of the mark to any state?

A. No, sir, there has not been.

Q. Has there been any delegation or assignment of the mark CFP to the Florida Bar or the Florida Supreme Court?

A. No, there has not been.

Q. Do you believe the Board of Accountancy has a right to control who can and can't use the CFP credential in the state of Florida?

A. In order to protect the marks, we are obligated legally to enforce their use. This means that we have to go after individuals who have misused the mark, licensees who many not use it properly, individuals who may use it but not have the right to use it, or other organizations or entities that would put upon it a meaning it does not have. The meaning placed upon it as a subdivision of public accounting is clearly erroneous.

MR. SAMPSON: No other questions.

THE HEARING OFFICER: Cross? –

MRS. PAM: I just have two questions for you.

[p. 175] CROSS EXAMINATION
BY MRS. PAM:

Q. Is there anything in your code that restricts the use of the CFP designation?

A. Yes.

Q. Can you tell me what that is?

A. It's restricted only to those individuals who are licensed by us to use it on an annual basis, Counselor. And the code provision regarding that is in Code 1 B1. It inidicates [sic] that all professional activities of the CFP designee shall be in accordance with applicable rules, regulations and other established practices of the IBCFP.

Q. If a state regulatory body has determined that the use of the CFP designation is in violation of their

rules, is there anything in that code of ethics that would override that?

A. Not that I know of, unless we feel that they're using the mark inappropriately, in which case we would have to enter it into a minimum discussion with them and perhaps litigation, but not unless that test is met first.

MRS. PAM: I have no further questions.

MR. SAMPSON: Just one on redirect, if I may.

REDIRECT EXAMINATION

BY MR. SAMPSON:

[p. 176] Q. You were asked about your code, let me hand you what I want to mark as Respondent's Exhibit 4 for identification.

THE HEARING OFFICER: Respondent's 4 - IBCFP General Information Booklet?

MR. SAMPSON: Yes.

(Whereupon, the documents referred were marked as Respondent's Exhibit 4 for identification.)

BY MR. SAMPSON:

Q. Mr. Goss, I'd like to hand you what has been marked as Respondent's Exhibit 4 for identification. Can you identify that booklet?

A. This is the General Information Booklet that we publish on a yearly basis. This is the most recent edition, published in early July, I believe.

Q. Does that accurately set forth the educational examination, experience and ethical requirements that apply to CFP and Certified Financial Planner?

A. Yes, it does. It's the booklet in general that we send to all individuals who inquire upon what is necessary to become certified with us, and other interested members of the public to which we send this.

MR. SAMPSON: I'd like to introduce Respondent's Exhibit 4 into evidence.

THE HEARING OFFICER: And 3?

[p. 177] MR. SAMPSON: And 3.

THE HEARING OFFICER: No objection and they are admitted.

(Whereupon, Respondent's Exhibit No. 3 and 4 were received into evidence.)

MR. SAMPSON: Nothing else.

THE HEARING OFFICER: Mr. Goss, for purposes of clarification, I'm entitled to ask certain questions under the evidence code. Don't answer anything except what I ask, then I'll give each counsel an opportunity to inquire.

BY THE HEARING OFFICER:

Q. Do I understand that IBCFP is incorporated?

A. Yes, it is.

Q. What state are you incorporated?

A. Colorado. We are a 501C3 organization in Colorado.

Q. And you have no ties or affiliations within the state of Florida, is that correct?

A. We have licensees within the state of Florida.

Q. You have no governmental affiliations with any licensing organization within the state of Florida?

A. That is correct.

THE HEARING OFFICER: Questions on the basis of my questions for clarification only, Mrs. Pam?

[p. 178] MRS. PAM: No.

THE HEARING OFFICER: Mr. Sampson?

FURTHER REDIRECT EXAMINATION

MR. SAMPSON:

Q. On the mark itself, explain how that was registered and with what body that was registered?

A. With the Patent and Trademark Office in Washington, D.C. Actually, I guess it's in Alexandria, Virginia.

Q. That is the United States Patent Office?

A. Yes. And, of course, there is common law protection, as I indicated earlier to a question, in English-speaking countries, including both protection under common law and registration statutes.

MR. SAMPSON: Thank you, Mr. Goss.

THE HEARING OFFICER: What do you want to do with this witness?

MR. SAMPSON: He may be excused.

THE HEARING OFFICER: Any reason to hold him, Mrs. Pam?

MRS. PAM: No.

THE HEARING OFFICER: Okay. Mr. Goss, we appreciate your attendance.

MR. SAMPSON: Next witness is Silvia Ibanez.

THE HEARING OFFICER: Mrs. Ibanez – any reason [p. 179] she can't testify from there?

MR. SAMPSON: No.

THE HEARING OFFICER: She has all her materials in front of her. Mrs. Ibanez was previously sworn, and she remains under oath.

WHEREUPON,

SILVIA IBANEZ

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAMPSON:

Q. Mrs. Ibanez, I understand from your testimony in the rule challenge, that you believe you are not engaged in the practice of public accounting, is that correct?

A. Correct.

Q. Why do you say that you're not engaged in the practice of public accounting?

A. Because I only have one practice, and that is the practice of law.

Q. Do you believe that the activities you perform in your law practice are at issue in these proceedings in the disciplinary case?

A. No. I believe it's just an advertising issue. They don't want me to use the CPA or the CFP credential in my advertising.

[p. 180] Q. You are aware of the Holding Out Rule, 21A-20.012 that the DPR's alleged you violated in the amended administrative complaint?

A. Yes.

Q. Are you holding out as described in the rule?

A. I believe that the rule is a definition – attempts to be a definition – it's a bit confusing, but if it's a definition, I don't see how I can be in violation of the definition. I either am or I'm not a CPA.

So, if your [sic] asking me am I holding out as a CPA – for identification purposes, yes, I identify to the world I am a CPA. Holding out in the context of what is the representation of my firm; clearly, representation to the public and the world is that I'm a law firm, not a public accounting firm.

Q. I would like to see Respondent's Exhibit's 1 A and B. Mrs. Ibanez, I will hand you what has been previously marked for identification and introduced into evidence as R-1A and R-1B, Respondent's Exhibit 1 are two photographs. Do you recognize those photographs?

A. Yes.

Q. Did you take those photographs?

A. Yes, I did.

Q. What do those photographs depict?

[p. 181] A. That one is the front of the building where I have my law offices, and the other is a stand-up sign on the front lawn, which is also on the corner. We are on an intersection, and it's on the corner of the lawn in front of the building – the law office building.

Q. When were those photographs taken?

A. In the last 60 days. I don't remember the day precisely when.

Q. When were the signs put up that are depicted in the photographs?

A. I've been in that building since early last year. Prior to that, I was in another law building in Lakeland. I transferred my – geographically from Lakeland to here.

Q. Are there any signs outside or even inside your office that state that you're a Certified Public Accounting firm?

A There is no signs.

Q. Or indication of CPA on the signs as you walk into the office?

A. No, CPA is not on any of the signs, nor public accounting firm, anywhere.

Q. Well, if you believe you're not practicing public accounting, do you also believe the DPR has any jurisdiction over you in this matter?

[p. 182] A. I believe they don't, because from, you know, every four years we have to take the law and the

rules exam. So, it's drummed into us. Even if we didn't want to keep up to date with the law and the rules, we have to. It's so clear in the law, in the preamble to Chapter 473, that all those provisions are there to regulate the practice of public accounting. And I'm not practicing public accounting. I'm practicing law.

So, why should they try to use those standards or that rule to measure my activities in the practice of law? I don't see it.

Q. To your knowledge, are you in compliance then with the Florida law regarding the use of the CPA credential, or do you contend that the law doesn't apply to you?

A. No. I believe Chapter 473 has several provisions that apply to those of us that are CPA licensees. In other words, there's provisions in Chapter 473, and I would contend those apply to anybody that has an active license as a CPA, which I am one of them.

And those provisions - I don't remember the citations, but it doesn't really matter - there's at least two of them that make reference to who can and who cannot use the CPA credential. And I am in compliance with Florida law regarding that. I'm in full compliance [p. 183] with that, I believe.

Q. Have you maintained your continuing education that you need to maintain to keep your status active?

A. Yes, sir. That's one of the requirements.

Q. Are there any other requirements you're familiar with?

A. You have to take a law and rules exam every few years, and pass that.

Q. Have you done that?

A. Yes, I have.

Q. Have you passed each time you've taken it?

A. Yes, I have.

Q. I would like to hand you, this time, what has been identified in the stipulation on the exhibit list as a CFP Certificate that the IBCFP issued. We have a copy of the certificate, and I want you to confirm that that is a true and correct copy. We'll have that marked for identification as Respondent's Exhibit 5.

THE HEARING OFFICER: Respondent's 5.

MR. SAMPSON: The CFP Certificate.

THE HEARING OFFICER: CFP Certificate of respondent.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 5 for identification.)

BY MR. SAMPSON:

[p. 184] Q. Mrs. Ibanez, is that an accurate copy of the original certificate?

A. Yes. That is a copy of the one that hangs on my wall.

Q. Is that in your office somewhere?

A. Yes, it's in my office together with all the other certificates and diplomas.

Q. What are those other diplomas that are hanging up there?

A. I have my State of Florida CPA License Certificate hanging on the wall. I have my Supreme Court of Florida, when I was admitted to practice, and then with the Florida Bar by virtue thereof. Certificates or diplomas regarding my membership with several professional associations.

I'm a member of the American Bar Association, Florida Bar Association; that's, the Supreme Court Certificate, I'm a member of the FICPA, for that we really have a card, on the FICPA we have like a small reduction of what that is. I carry that with me but I don't know if I have it with me today. Also a member of the AICPA – the American Institutes of CPA's. I'm also a member of the ICFP, and the ICFP is the voluntary membership association for those of use that are CFP's.

Q. Is that the professional organization?

[p. 185] A. That's a professional membership organization for CFP's, which is different from the IBCFP, which was Mr. Goss. I have a certificate from them. Then I have various other awards and things like that hanging from the wall.

Q. Are you aware of any prohibition under Florida law that prohibits your use of the CFP credential?

A. No, not even the one that's in the complaint. The complaint talks about misleading or fraudulent or deceiptful [sic], or whatever advertising; and it's true, I do have the CFP credential.

Q. Do you know of any of your own clients who have every [sic] been misled by your using CFP credential?

A. Not at all.

Q. In your advertising?

A. Not at all, to my knowledge.

MR. SAMPSON: I'd like to mark for identification Respondent's Exhibit 6, a copy of the Registered Investment Advisor License. We have the original. I would like to substitue [sic] a copy, if there is no objection. Let me first have it marked – a copy of it.

THE HEARING OFFICER: Registered Investment License.

MR. SAMPSON: Yes.

[p. 186] MRS. IBANEZ: Or just Investment Advisor, we call it the RIA registration.

THE HEARING OFFICER: Registered Investment Advisor License will be Respondent's 6. Any problem with copies Mrs. Pam?

MRS. PAM: No.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 6 for identification.)

BY MR. SAMPSON:

Q. Can you identify what's been marked as Respondent's Exhibit 6?

A. Yes.

Q. What is that?

A. It's a copy of the State of Florida's Division of Securities and Investments' License that's issued to Registered Investment Advisors under Chapter 517, Florida Statutes. It's the one that's currently in effect. They issue one every year based on an annual form and disclosure and some other requirements.

Q. Are you required to disclose that you're an RIA in any content?

A. I am required to disclose, as an RIA, all my background and credentials and licenses, et cetera, to members of the pulic [sic], particularly those members of the public that seek out financial planning services.

[p. 187] Q. Do those requirements include your disclosing to the public that you're a CFP and, or CPA?

A. I'm sorry. Could you say that again?

Q. Does the requirements that apply to Registered Investment Advisors, to your knowledge, are you required to disclose to the public that you're a CFP and, or CPA?

A. Sure. I can't leave anything out. I have to comply with Florida law and Florida law, Chapter 517 requires that. I even had to give them something tangible in writing, and that is what they call the Brochure Rule. And the Brochure Rule also discloses this information for them.

MR. SAMPSON: I move to introduce into evidence Respondent's Exhibit's 5 and 6.

THE HEARING OFFICER: Respondent's 5 and 6 are admitted into evidence.

(Whereupon, Respondent's Exhibit 5 and 6 were received into evidence.)

BY MR. SAMPSON:

Q. I would like to hand you what has been marked as Petitioner's Exhibit 1. I believe that is a copy of your business card. I've got a copy of the unmarked one. Let me show you what appears to be an original. Would you identify what's been previously marked and introduced as Petitioner's Exhibit 1?

[p. 188] A. Yes, that's my business card for my firm.

Q. Where does it say on there that you're a public accounting firm?

A. It doesn't say that. It says "law offices."

Q. Are those cards distributed to your clients, or who are those cards given to?

A. I have some that are sitting on my desk, on a card tray. I have some that are sitting on the receptionist desk in the lobby. And, actually, the people I exchange cards with the most are other colleagues, whether they're CPA's or attorneys or CFP's at professional meetings or we have dinner seminars or whatever, I end up doing that a lot.

Sometimes a client will be sitting there and they'll pick up a card, or a potential client when they're sitting in front of my office – in front of my desk. So, there's a variety of uses.

Q. What is your understanding of the Department of Professional Regulation or Board of Accountancy's rational [sic] for allowing you to display your CPA license in your office?

A. As I understand it, they feel that if somebody sees it on the wall, that you can disabuse that person from thinking that you're practicing public accounting by just telling them, if they ask or if you want to mention [p. 189] it, I don't know what their requirements are, you know.

I'm not practicing public accounting, look at that certificate up there, but I'm not practicing public accounting. I assume that's what the rationale is. They have voiced that in the rule challenge that you have an opportunity to clear the air, if there was any confusion in the first place.

Q. Has there ever been confusion to your knowledge, with any of your clients about the type of practice you're engaged in?

A. No.

Q. Has there been any confusion in the minds of potential clients of yours that they've expressed to you about them being confused about the type of practice you're engaged in?

A. No, I've never heard anything about being confused.

Q. Have you ever heard anything from clients or potential clients that they have been misled by your using CFP or CPA?

A. Never.

Q. Are you familiar with prior proceedings instituted by the DPR against you for violating the holding out rule?

A. Yes, very familiar.

[p. 190] Q. Would you please explain the circumstances of those proceedings?

A. I didn't ask, in that case, exactly what was sent to them, but I believe some kind of either a business card or stationery, something like that was sent to the DPR back in 1985. And they sent me a letter that was very similar to the letter I got this time, which is, basically, we're looking at you for a possible misconduct and all this and everything that follows with misconduct and disciplinary proceedings. You have 30 days to respond to this.

And it was exactly the same issue using the CPA credential when they don't want me to use the CPA credential.

Q. What was the precise charge or allegation by the Probable Cause Panel?

A. They found no probable cause in 1986.

Q. I'm not asking the finding right now. I'm asking you what were they interested in. What were they investigating at the time? What particular conduct of yours were they looking at?

A. I know for a fact that they cited the Holding Out Rule 21A-20.012. I'm not sure which other rule or statute

they would have cited in addition to that to say that I was violating laws or rules. I'd have to look at [p. 191] that original inquiry letter back in 1985. I don't really recall what other citations they had in the letter.

Q. To you knowledge, was there an issue about your using CPA in your yellow pages or white pages ads?

A. I don't remember if it was the yellow pages, but I know it was something in writing. I think it might have been the stationery, as opposed to the yellow pages.

Q. This would be – which stationery is that?

A. At the time, I had a financial planning firm and my stationery and business cards said a financial planning firm.

Q. Were you a lawyer at the time?

A. I was a lawyer, I was a JD, but I didn't have a law office or a law firm at the time. I had a financial planning firm.

MR. SAMPSON: I'd like to have marked for identification as respondent's next exhibit –

THE HEARING OFFICER: Respondent's 7.

MR. SAMPSON: – memorandum of Finding of Probable Cause.

THE HEARING OFFICER: Memorandum of Finding of Probable Cause Panel 12/29/86.

(Whereupon, the documents referred to were marked at Respondent's Exhibit No. 7 for identification.)

BY MR. SAMPSON:

[p. 192] Q. Let me hand you now what has been marked as Respondent's Exhibit 7. Have you seen that document before?

A. Yes.

Q. Please identify the document, if you can.

A. This is a document that I had to pull teeth for to get. It took me quite a long time, but it was the official written conclusion, or result, of that initial inquiry that started in 1985. I asked them – they kept telling me over the phone, you're okay, you know, there's no probable cause, and they wouldn't put it in writing.

And I just had to follow it up forever, all the way up to the Attorney General's office. And I guess I got somebody mad at that point. And I had, I believe it was Mr. Tunnicliff, General Counsel for DPR, called me and said, "What do you want?" And I said, "I want it in writing." And he finally sent me this very quickly. As soon as I talked to Mr. Tunnicliff, they sent it.

Q. Let me clarify here that one of the issues that the Probable Cause Panel considered was whether your use of CPA in connection either with your letterhead or some other advertising was a violation of the Holding Out Rule 21A-20.012, is that correct?

A. Yes.

MR. SAMPSON: I move to introduce into evidence

[p. 193] Respondent's Exhibit 7.

THE HEARING OFFICER: it is admitted.

(Whereupon, Respondent's Exhibit No. 7 were received into evidence.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, you are a CPA with an active license, correct?

A. Yes, sir.

Q. How do you consider your status as a CPA?

A. I am a CPA not engaged in public accounting. A simple way that I've seen, using literature to shorten that, is I'm a non-attesting CPA, not engaged in the practice of public accounting.

Q. Explain what your use of the phrase "non-attesting" means. Why is that significant to use that phrase?

A. It's real significant. The American Institute of CPA's every year published an annual financial statement, and they've made this entire list of over 300,000 CPA's with licenses across the United States. And this is right in the audited financial statements that are in the publication of the Journal of Accountancy that comes out every November of every year.

And there they classify the CPA's based on, are they engaged in public accounting or are they an industry, are [p. 194] they comptollers [sic], are they this, are they that. Are they in education, are they government, are they practicing lawyers, are they in the military, and

others. And they clearly recognize that there is a distinction. And they have the first category with big bold headline CPA's Engaged in Public Accounting. And then they have another bold for all the other classifications.

And, we're the biggest segment right now, according to the 1990, and what's right there in the audited financial statements. They're like 50 percent of all of the US's CPA's are not engaged in the practice of public accounting. We are non-attesting CPA's. We are in all these other fields out there. And they're in the minority now.

Q. Who are the "we" you're referring to?

A. We in industry, we in education, we in government, we in law firms, we as bankers, we as trust officers – I mean it affects so many different professionals. But all of them have one common denominator, and that is they are non-attesting CPA's.

They are non-attesting CPA's – they do not do the test [sic] function. That's really the only thing that binds them all together, because all of them in all those careers can certainly do anything else by being a CPA.

Q. You are a member of the AICPA – American [p. 195] Institute of Certified Public Accountants?

A. Yes, I am.

Q. From time to time, do you receive various dues statements from the AICPA?

A. Yes. As a matter of fact, I just got one not too long ago. Every year I get one.

MR. SAMPSON: I'd like to mark for identification a copy of the recent dues statement of the AICPA. Respondent's Exhibit 8.

THE HEARING OFFICER: Respondent's 8, the AICPA dues statement 7/31/92.

(Whereupon, the document referred to were marked Respondent's Exhibit No. 8 for identification.)

BY MR. SAMPSON:

Q. I'll hand you what has been marked Respondent's Exhibit 8. Is this a copy of your current dues statement from the AICPA?

A. Yes. There are two pages here, the front and then the back.

Q. Now, you refer to various codes that the AICPA assigns to various members. Have they assigned you a code?

A. Yes, since I'm a practicing attorney, my code is 96 based on the job codes that are explained on page 2, which is the back of the actual dues statement. And they [p. 196] have a code for everyone. And if they don't have one for you then you're other.

Q. What is Code 96 under the AICPA?

A. Code 96 is a practicing lawyer.

Q. I would like you to read under the job code section underneath the account number and year-ending line, the line that begins with job code.

A. They classify me as "Job Code 96, Practicing Lawyer."

Q. Is there a category for practicing public accountants?

A. Yes. They have one, two, three, four different subcategories all under the heading of the practice of public accounting. Those are codes 43, 44, 45, 46, depending on your status in the firm, if you're staff, supervisor, or partner.

Q. You are a sole practitioner of law, correct?

A. Correct.

Q. Is there a category for sole practitioners of public accounting?

A. Yes, they do. They have sole practitioners, Code 44 in the practice of public accounting.

Q. You haven't been assigned that code, have you?

A. No, and I shouldn't.

MR. SAMPSON: I move to introduce into evidence [p. 197] Respondent's Exhibit 8.

THE HEARING OFFICER: Respondent's 8 is admitted.

(Whereupon, Respondent's Exhibit No. 8 was received into evidence.)

BY MR. SAMPSON:

Q. Do you have any knowledge of the breakdown in Florida between non-practicing active CPA's and practicing CPA's?

A. Do you mean as to the Board of Accountancy or do you mean as to the Florida Membership Association,

because it's a different answer depending on which one you want.

Q. Let's take each of those. Let's first take the Board of Accountancy.

A. Well, I've asked the Board of Accountancy more than once, either through public records request and in other correspondance [sic]. And I've gotten two answers that confirm each other, and they confirm the law. And, that is, the only categories they have are CPA's with active licenses and CPA's that don't have active licenses. I believe that is the only distinction they have.

Q. Do you have any documentation about how the BOA breaks down CPA's?

A. I don't know. I don't know if they're interested. I don't believe they have other categories. [p. 198] I'm not trying to make light of it. I really don't think they have any other categories. That's what they told me in writing.

MR. SAMPSON: I'd like to have marked as Respondent's Exhibit 9, letter of March 25, '91.

THE HEARING OFFICER: Respondent's 9 for identification is 3/25/91 Ibanez to Willis letter.

(Whereupon, the document referred to were marked as Respondent's Exhibit No. 9 for identification.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, please identify, if you can the Respondent's Exhibit 9.

A. It's a letter that I sent – public – one of my many public records I requested from Mrs. Martha Willis. And

she promptly answered me back. My letter was dated March 25, and she wrote me back just a few days later. I don't believe she signed her answer anywhere, but she did insert the answer after each one of my questions in the blanks within my letter. And that's what I refer to having received something in writing.

The third question in that letter asked about if you have any classifications of all of your licensees other than by an active license or not, please tell me what classification that is. And she said, "none, only categories are active and inactive."

[p. 199] Q Did you receive this letter back from Mrs. Willis, is that how it worked?

A. Yes. She answered my original letter. She inserted her answer right on the face of my original letter and returned my original letter back to me. Although, she did not sign it.

Q. The handwriting that is yours, appears where?

A. Mine is at the bottom of the letter.

Q. Your signature alone?

A. My signature.

Q. Do you know whose handwriting the rest of it is?

A. I assume it's Mrs. Martha Willis, but I don't know since she didn't sign it.

MR. SAMPSON: I move to introduce Respondent's Exhibit 9 into evidence.

THE HEARING OFFICER: Respondent's 9 is admitted without objection.

(Whereupon, Respondent's Exhibit No. 9 were received into evidence.)

THE HEARING OFFICER: Folks, we have been at it a little over an hour. Would anyone be prejudiced by a 10 minute recess?

MR. SAMPSON: No.

THE HEARING OFFICER: Mrs. Pam?

MRS. PAM: No.

[p. 200] THE HEARING OFFICER: Okay. Ten minutes.

(Whereupon, a recess was had and the proceedings resumed at 2:15 p.m.)

MR SAMPSON: What was the last exhibit number, please?

THE HEARING OFFICER: Nine has just been admitted.

BY MR SAMPSON:

Q. Mrs. Ibanez before the break, we were talking about various classifications of certified public accountants; those actively practicing or actively licensed and those who are not actively licensed under the Board of Accountancy's categorization, correct?

A. They have active and inactive, that's it.

Q. You have also indicated that the answer would be different on how CPA's are categorized within the

state of Florida, and we were talking about an entity, not the BOA, but some other entity. What were you talking about?

A. Well, we already talked about – across the United States – the national organization of CPA's, the National Membership Association, which is the ICPA [sic], and we talked about all their codes, But they're not the only ones that do it. Here in Florida, the FICPA also does it that way. They recognize and validate the existence of those of us that are not engaged in the practice of public [p. 201] accounting, and they have a code system to reflect that.

MR. SAMPSON: Let me have marked as Respondent's 10 for identification a memorandum of April 16th '91 and FICPA letter.

THE HEARING OFFICER: Respondent's 10 FICPA memo 4/16/91.

(Whereupon, the documents referred to were marked as Respondent's No. 10 for identification.)

BY MR. SAMPSON:

Q. Looking at Respondent's 10, can you identify that document? do you have any knowledge of that document?

A. Yes. I called the membership department of the FICPA. I called them before they were officially in the case by the way. So, I just called them because I'm in that association. And I said, do you have any membership statistics regarding – in Florida – either for the current year or for any year, do you have any based on what they practice in? What's CPA's practice; are they engaged in

the practice of accounting, or are they engaged in some other practices, whether it's law or banking or whatever it is.

They said, "Yes we do, we categorize it," and I said, "Well, can you give me a recent statistic as to how many there are in one versus the other; those in public [p. 202] practice and those not in public practice. And, she was very efficient, very quick – in a matter of days she sent me this memo.

Q. Who is she?

A. Debbie Mills, she's in the membership division of the FICPA, and she gave me this memo back just, basically, the statistics for the last five years from 1987 to 1991 – the percentage statistics.

Q. What is the percentage breakdown for April of '91 of the membership of the FICPA?

A. It's really curious because I remember seeing the memo, and she had Public Practice, 49 percent; and then she had Not in Public Practice, 35 percent. And, of course, being able to add and seeing that that didn't make a hundred percent, I called Debbie back on the phone. I said, "Debbie, that doesn't make a hundred percent. Is there something missing there?" She said, "Yes, they also have another category of people like associate and retirees and positions like that that are not in public practice." And they have that as like a third category. And, since I just asked in public practice, and not in public practice she just didn't add that third category. And if she had added it on the memo, it would make a hundred percent.

Q. Where do they put you, do you know?

[p. 203]A. I believe I'm in the "not in public practice" category because I know they have a code system that I don't have with me today, but it would be fairly easy to get from the FICPA.

Q. Is that similar to the AICPA code?

A. Very similar. They don't have the same numbers, but I believe the classifications on their two statements are almost pretty much verbatim, as far as the description. And they have different classifications under the practice of public accounting, and then they have all the other ones. They have members in industry, members in education, members in government, attorneys, military, retirees. I think the FICPA had that one different. They had an actual section for retirees, and I don't remember if the AICPA had that or not.

Q. To your knowledge, within the categorization of public practice by the FICPA, does the FICPA include any people based on whether they hold out as CPA's or not?

A. No, not at all; based on what we actually do, what our practice is and what we report to them on or dues statement and our representation to the organization.

MR. SAMPSON: I move to introduce Respondent's Exhibit 10 into evidence.

THE HEARING OFFICER: Respondent's 10 is admitted without objection.

[p. 204] (Whereupon, Respondent's Exhibit No. 10 were received into evidence.)

MR. SAMPSON: Thank you. I'd like to have marked as exhibit 11 for respondent, letter of August 26th '86 from the DPR.

THE HEARING OFFICER: Respondent's 11, 8/26/86 Feingold to Ibanez letter.

MR. SAMPSON: Thank you.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 11 for identification.)

BY MR. SAMPSON:

Q. Would you please look at Respondent's Exhibit 11. Can you identify that letter?

A. Yes. That's a copy of the original letter that I got from Miss Jean Feingold. I believe, as I stated in – well, she has signed it – back then in 1986, she was the coordinator for the Continuing Education Division, and I had written her or asked her – I don't remember if I wrote her or asked her over the phone – but I requested information regarding the Active and Inactive license. Ever since back then I've been very interested in this whole issue, especially when it started back in '85.

Q. Would you please read the first paragraph for the record?

A. Sure. "Dear Mrs. Ibanez, according to the [p. 205] records of this Board, we show that you are currently licensed to practice (active status.) There are only two license statuses as far as this Board is concerned; active and inactive. An active CPA has the legal right to practice, but is not required to do so. In fact, many CPA's who

are licensed to practice are not presently in public accounting."

MR. SAMPSON: I move to introduce Respondent's Exhibit 11, the letter of August 26th '86 into evidence.

THE HEARING OFFICER: Respondent's 11 is admitted.

(Whereupon, Respondent's Exhibit No. 11 were received into evidence.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, the yellow pages ad that you've been cited for in the amended administrative complaint, have you seen that ad?

A. Yes.

Q. Did you see the ad that was sent in to the Board of Accountancy?

A. Yes.

Q. Could you please describe the ad that you saw.

A. When I asked them to disclose to me exactly what, quote, was the complaint. You know, what is the [p. 206] name of the person who did it, was it a client, was it a member out there of the public, was it a CPA, was it anonymous.

And after they did that, to please send me, also, what it was. And they also had sent me some information just initially, without me even asking, when they first started the whole proceedings. They told me that it was

number one: anonymous. Number two: that there was no note. I guess no little yellow sticky pad saying this is a complaint, or no letter, no anything to disclose who was the sender.

And from my seeing it, it was only the yellow pages advertising, I believe. I'm not sure if they sent the white pages advertising. But, what I saw was the yellow pages attorney section advertising. And it had a big circle that somebody had put on there around my name. And my name in the yellow pages advertising had been circled. That was it. That's what I saw that had been sent in to the DPR – Board of Accountancy.

Q. You are employed by an entity Silvia S. Ibanez, P.A., are you not?

A Yes, I am.

Q. Is that the correct name – legal name of the employer?

A. Yes, it is. P.A. standing for Professional [p. 207] Association.

Q. Is that professional association required to be licensed with the Board of Accountancy?

A. Not at all. It's a law firm.

Q. Is there any exclusion, to your knowledge, in any of the holding out rules or the definitions of practicing public accountancy for employers who are not required to be licensed by the Board of Accountancy?

A. Absolutely.

Q. Where is that found?

A. A rule in Chapter 21 – 21A, if my memory serves me correct, 20.011 subsection A or 1. It's the first exclusion rule. And it says if you are, I believe, a governmental employee, or employed by an employer that's not required to be licensed under Chapter 473, then you are not practicing public accounting: irrespective of the activities.

I believe there is some jargon to that or language to that in the preamble to the rule.

Q. Let me talk a bit about activities since they seemed to be a focus, if you recall, at the rule challenge portion. Mr. Rimes asked you extensively about the activities you are engaged in. Do you recall that testimony?

A. Yes, I do recall it.

[p. 208] Q. And based on those questions that he asked you and your responses, do you still believe that you're not practicing public accountancy?

A. Yes.

Q. Even though you deal with –

A. Tax opinions, and things that other CPA's do, that's why we stipulate to it, yes. I still maintain wholeheartedly that I'm not practicing public accounting because that rule 21A-20.011 was made for all of us out there that do have some activities that are identical with the activities of the CPA's.

But, if we are working within a firm that's not a public accounting firm, and mine is not, that is deemed to

be a private employer. And I'm not deemed to be practicing public accounting. And there is many opinions to that effect, as well.

Q. Are you aware of any Board of Accountancy opinions to the effect that an employer who is not required to be licensed by the Board of Accountancy, is allowed to employ someone who can use the CPA credential?

Do you understand the question?

A. If you say it again, I probably will understand it.

Q. Let me ask you to assume that there is an employee who is an actively licensed CPA.

[p. 209] A. Yes, sir.

Q. And he works for an employer who is not a licensed certified public accounting firm with the Board of Accountancy –

A. Like a bank?

Q. – for example, a bank. Nor is that employer required to be licensed by the Board of Accountancy, are you aware of any opinions that would go to the issue of whether the employee can use CPA?

A. Yes. There is various opinions that, through my researches and asking for public records at request, there is many private employers. Some of these are banks, some are trust officers, some are mortgage brokers, some are investments people like Merrill, Lynch – an employee of Merrill, Lynch – some are insurance firms, some are

insurance administration firms. One was a sports management firm. There's all kinds of private employers out there.

Q. In any of those various opinions you've referred to – first of all, are those ones that have been officially recognized?

A. Yes, they have. I believe the FICPA introduced them in the rule challenge.

Q. Also, Brewster's attorney had some opinions officially recognized as you, yourself.

[p. 210] A. I believe so, yes. I introduced a few myself, yes, sir.

Q. In any of those examples you mentioned, did the Board of Accountancy approve the use of CPA by an employee of a firm that wasn't a CPA firm?

A. Yes, of a firm that was a private employer?

Q. Yes.

A. Several times. They say go right ahead, use the CPA credential.

Q. Are you familiar with the Zallus [sic], Cruz, Steinman and Williams opinions?

A. Yes, and I also have a digest for myself with a name and the date because that helped me to refresh my memory if I could –

Q. If you have that with you go ahead and look at it.

A. – look at that to refresh my memory?

Q. Sure.

A. Then I could give you the exact date of those opinions.

THE HEARING OFFICER: Mr. Sampson, let me take this opportunity to perhaps inquire where we're going. If these have already had official recognition in the disciplinary case, it is not necessarily helpful to me to have Mrs. Ibanez read [p. 211] them. I have two concerns. One, I think it would be cumulative to have her read them. And two, if they are already in this case, please tell me where. And, if they aren't in this case, do we need to do something specific evidentiary wise to get them into this case from the other one.

MR. SAMPSON: I understand both of those concerns. On the first one, we are not asking Mrs. Ibanez to read these opinions in. And I want to make certain that they are in evidence, and have been officially recognized.

THE HEARING OFFICER: If you have copies of them, I think –

MR. SAMPSON: Maybe that's the way to do it.

THE HEARING OFFICER: It would make a cleaner case, but I don't want to spend anybody's money unnecessarily.

MR. SAMPSON: They're not that many. There's only four, I believe.

THE HEARING OFFICER: Are they stipulated in the pre-hearing stip, or have they already been officially recognized and filed in this case?

MR. SAMPSON: They've been officially recognized in the rule challenge, I believe most of these. In terms of this case, it's my understanding we're [p. 212] adopting everything from the rule challenge that's in evidence, and if not, I'd like to move that we –

THE HEARING OFFICER: No, sir. That was not the arrangement, that you would make an arrangement and that you would move in whatever you wanted from the earlier case. And I specifically indicated that at the beginning of this hearing as to whether or not you folks asked those questions. Have you folks made arrangements as to how to do that; how to preserve the record from the other case, and how to preserve this record because they are now bifurcated. Do I understand that in this cause you want everything that was admitted in the prior cause?

MR. SAMPSON: With respect to the informal opinions and the testimony of the witnesses, yes.

THE HEARING OFFICER: Okay. Well, then we're going to have to –

MR. SAMPSON: I misunderstood you.

THE HEARING OFFICER: – make some arrangement to do that because the records are going to go to different locations at the conclusion of the final order case and the recommended order case. And that is what I tried to make clear to everybody before we started.

Additionally, on your pre-hearing stip, I [p. 213] understood that there were only the starred items that

anybody intended to adopt from the other case. That seemed to be what you were saying in that.

MR. SAMPSON: We intended to say that those had already been introduced and would not need to be reintroduced. The only new items were those that aren't starred on the list. We're dealing with our failure to communicate to you clearly what we want here.

THE HEARING OFFICER: The only things that you want from the other case are three starred items: the State of Florida CPA license, am I correct?

MR. SAMPSON: No. What we would like is that evidence that was introduced in connection with the rule challenge. Because one of our affirmative defenses is readopting the rule challenge. So, we want all the evidence from that to flow down into this case.

THE HEARING OFFICER: We've been through this about four times, Mr. Sampson. Let me see if I understand your pre-hearing stip because it appears you said something very different here. There are only three items starred on this revised Exhibit A of your pre-hearing stip. It indicates these have previously been submitted in the rules challenge.

[p. 214] It seems to me those are the only duplicate matters to some over from the original rules case challenging the holding out rule. Why are these listed here and none of the others listed from the other case, if you folks reached a stipulation?

MRS. IBANEZ: Can I answer to that? In the rule challenge, because we had such a difficulty in getting one list, all the parties in the rule challenge had their list of

exhibits. I suppose we had the misunderstanding that once there was a motion for official recognition on any of that, since we had asked for consolidated proceedings, anything that was on the record for the rule challenge, I thought I had heard you say and, I thought that we had an order to the effect that everything from the rule challenge on the record including exhibits submitted into the record, which the FICPA did, and Mr. Brewster and his law firm did – would be used here already on the record without having to be reintroduced.

What we did here was basically just go to the list of exhibits on items that we had on our original list Ibanez, in that case, Petitioner; in this case, Respondent. And rather duplicate everybody elses exhibit list, because they're all on different pages, we did not attach them to this pre-hearing stip and [p. 215] that is where – because we felt it was already in the record. And that's where – we apologize for any misunderstanding.

THE HEARING OFFICER: Okay. Mrs. Pam, what is your understanding with regard to your pre-hearing stipulation?

MRS. PAM: I think I had the same basic understanding that they did. From your order, it said – and I guess it was a misinterpretation of your order that said that we would still have the opportunity to adopt testimony and exhibits. I guess our failure was to make the arrangements to adopt the testimony and exhibits. But our communication back and forth –

THE HEARING OFFICER: If the parties have no problem with everything from the earlier rules case coming into this case, I don't either. However, you have a

logistical problem that may be insurmountable by your not recognizing it earlier. Let me explain the problem.

As I set out at the beginning of this hearing, there is a final order to be entered in the rules case. All of that record remains with the Division of Administrative Hearings absent an appeal. The entire record of the recommended order is sent back [p. 216] with the recommended order to the agency that then enters a final order. If you are going to adopt from one to the other, you may have a very difficult situation logistically with regard to how this is going to proceed.

In other words, you're going to have your exhibits in different locations for purposes of say, the entering of a final order by the Department of Professional Regulation al la Board of Accountancy, and the period of time during which you have to file your exceptions, whichever one of you doesn't like the final result here from me, and it's sitting over there while you still have potentially an appeal time running on the final order. Is everybody or anybody with me on this explanation?

MR. SAMPSON: I'm with you on that. This may or may not be the appropriate time to bring this up.

THE HEARING OFFICER: Let's try to solve all problems the best way we can, Mr. Sampson. What do you need?

MR. SAMPSON: We had intended to move that you abate making any decision in the disciplinary case until the outcome of the rule challenge, and all appeals that may pertain in that. So, logistically, you have the

record completely with the rule [p. 217] challenge until that was totally concluded.

The basis for that motion would be that if you find Mrs. Ibanez in violation of the rule, it's ultimately held to be invalid. Then she had been found subject to discipline, and has to report to people that she was found to be in violation of the rule of the BOA, that's ultimately on appeal or elsewhere held to be invalid.

THE HEARING OFFICER: I understand your concern, Mr. Sampson. It's not that I don't appreciate the legal issue that you're involved with. My concern right now is the logistical issue to help each of you try your best case. Abating the disciplinary case, pending the outcome of the holding out rule case, still leaves us with the problem of where the exhibits are at any given moment and this was something I tried to solve by consolidating these to begin with.

Mrs. Pam, let me hear your position on – I think an abatement is inappropriate. Let me see if there is procedural way that I can accommodate everyone. What would be your position on my retaining jurisdiction with regard to the disciplinary case, and giving you all an opportunity for proposed findings of fact and conclusion of law [p. 218] after the rules case is determined?

MRS. PAM: That's fine.

THE HEARING OFFICER: Mr. Sampson, an opinion on that one.

MR. SAMPSON: That's, I believe, fine with us. Yes, that's fine with us.

THE HEARING OFFICER: Let me think for just a moment, I think I just outsmarted myself. You would then have to have additional time for your proposals in this case, and that would conflict with your two periods of time – your different periods of time with two different procedural aspects.

MR. SAMPSON: If the concern is that we need to have a duplicate of the record, and that's certified to be an accurate copy of what has already been admitted in the rule challenge procedure, we can take care of that problem and get a duplicate made and certified by yourself or someone else and pay for that cost of doing that.

THE HEARING OFFICER: That was the original idea of trying to save you money by consolidating that. Do I truly understand you want to adopt all of the testimony from the rules case into the disciplinary case, and not just the exhibits?

MR. SAMPSON: Without combing the record again, [p. 219] I believe that is our position. There's been an affirmative defense raised here that the holding out rule is invalid. All the testimony we presented at the rule challenge would be pertinent to that affirmative defense here.

THE HEARING OFFICER: There's no dispute between these two parties as to the adoption of either the testimony or the exhibits from the earlier case. The parties are in agreement as to that being the appropriate way to try this one. I'm not going to second guess you, and make it difficult on you. I'm here to resolve disputes, I'm not here to make life difficult for anyone. I will permit you to do that by stipulation.

MRS. PAM: Is that your stipulation, Mrs. Pam?

MRS. PAM: Yes, it is.

THE HEARING OFFICER: Is that your stipulation, Mr. Sampson?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Good. Let me clarify this record, if it is possible for me to do so. In the 91-3336R case, exhibits were designated Ibanez 1 through 9, Brewster 1 through 11, FICPA 1 through 17. Are you folks adopting these as joint exhibits? It probably makes no difference whatsoever except under [p. 220] the English common law. Are you all on the same wavelength? Some of these were not admitted in that hearing. You are adopting those that had been in evidence in that case, is that correct?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Then it is not necessary to renumber any of the exhibits with regard to this case, because in this case we have used Petitioner and Respondent. Now, the next stage is to find out how we do not duplicate and I think that's what I just asked you all to look for.

(Whereupon, a discussion was had off the record.)

THE HEARING OFFICER: Very well, let's return to the record. Let me be entirely clear with my rule. I have ruled to ratify the parties' stipulation. The parties adopt into the record the DOAH Case No. 91-4100 all admitted exhibits, all testimony of all witnesses regardless or by whom offered or presented.

In the record of Case No. 91-3336R that is not to say that anything admitted or oral testimony from today's disciplinary hearing will be considered in the rules case for which the record has already closed. And that there will be a post-hearing order entered after today's hearing permitting the parties [p. 221] in both cases to advise me by memorandum or however, how the Court should handle the record, and the dates for the proposed findings of fact and conclusions of law in this case and in the proceeding rules case.

There may need to be some adjustment as to proposals in the other case as a result of this. I'll give everybody ten days to advise me, if necessary, I'll schedule a telephone conference call. Understood?

MR. SAMPSON: Yes.

MRS. PAM: Yes.

THE HEARING OFFICER: They all understand. Okay. Proceed, Mr. Sampson.

BY MR. SAMPSON:

Q. Mrs. Ibanez, before all that confusion about the record, from our part I guess, occurred, I was asking you about some various opinions you were aware of by the Board of Accountancy relating to –

A. Private employers.

Q. – private employers, correct; and whether or not that issued opinion on whether employees of such private employers could use CPA, and you indicated you were familiar with some opinions, am I correct?

A. Yes, I am familiar with them.

[p. 222] MR. SAMPSON: I would like marked as a composite exhibit for respondent, opinions that we believe are not previously in the record.

THE HEARING OFFICER: This is going to be Composite R-12?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Do you we have something that will make them composite? R-12 BOA opinions. How many?

MR. SAMPSON: I believe there are eight.

THE HEARING OFFICER: Very well. A composite, eight Board of Accountancy opinions.

(Whereupon, the documents referred to were marked as Respondent's No. 12 for identification.)

MR. SAMPSON: I move to introduce into evidence Respondent's Exhibit 12. Mrs. Pam, have you had an opportunity to look through those?

MRS. PAM: I have no objection.

THE HEARING OFFICER: Very well. Without objection, Respondent's 12 is admitted.

(Whereupon, Respondent's Exhibit No. 12 were received into evidence.)

MR. SAMPSON: Thank you. I have no other questions of Mrs. Ibanez at this time.

THE HEARING OFFICER: Are you ready for cross, [p. 223] Mrs. Pam?

CROSS EXAMINATION

BY MRS. PAM:

Q. If you contend that you're not in the practice of public accounting, why is it that you use the CPA designation?

A. Because I've very proud of it, and I am a CPA and there's various Florida laws that require me to disclose it. I have to comply with the law.

Q. Have you testified that you perform some of the same services in your law firm that CPA's perform for the public?

A. There are many activities that are identical of various professions with that of CPA public accountanting it's stipulated to.

Q. It's your contention then that although you're providing the same services, you're not practicing public accounting?

A. Correct, because of the rule that excludes me from that.

Q. And you're talking about Rule 20.011?

A. Yes, ma'am.

Q. Do you provide services for the public?

A. That rule just says that I'm working for a private employer. So, based on that rule, it doesn't [p. 224] matter who I'm providing services for. That rule says if I'm working for a private employer that's not required to be

registered under 473, and I work for my law firm, which is a private employer.

Q. But you are providing services to the public?

A. Yes, but I don't believe that's required in the exclusion rule to be proved anywhere.

Q. If you were practicing public accounting in your law firm, say you were doing the dual professions, would you then have to register your law firm as a public accounting firm?

A. Are you saying in the hypothetical that I wanted to have two practices?

Q. In the hypothetical that you are practicing public accounting and practicing law.

A. And what is the question?

Q. Do you think you would have to license your law firm?

MR. SAMPSON: Object to the question. It assumes facts that are not nor will they be in evidence.

THE HEARING OFFICER: Overruled.

MRS. IBANEZ: If I had a separate practice, and I was also practicing public accounting, then that firm would be registered with the appropriate party [p. 225] as a public accounting firm. And, probably, I would have it in a separate entity as well. So, there's a lot of legal things I would do differently as well.

BY MRS. PAM:

Q. Do you think that you could practice public accounting in your law firm?

A. Well, I don't practice public accounting in my law firm so are you asking me another hypothetical?

Q. Do you think that you could?

A. I believe that in my law firm, what I do is practice law.

Q. But, do you believe that in your law firm practice, that you could also provide public accounting services?

A. I believe I could provide services that are identical. I wouldn't call them public accounting services ever. That's BOA's wrongful use of the term.

Q. If you decided that you wanted to do tax returns, do you think you could do that out of your law firm?

A. Other estate planning attorneys do, and they're not CPA's, and they're not accused of practicing public accounting. They do 706's all the time, right and left. I don't, by the way, but they do.

So, I certainly could do it as a law firm, and I [p. 226] don't think anybody would say that is an activity that is the practice of public accounting.

Q. Do you use the CPA designation on your law firm stationery?

A. No. But I have on my stationery Silvia S. Ibanez, P.A. and Attorney at Law, and I have some membership designations that apply to me.

Q. Why don't you use the CPA designation on your letterhead?

A. I may at any time. I certainly think I have the right to do so.

MRS. PAM: I don't have any further questions.

THE HEARING OFFICER: Redirect?

MR. SAMPSON: No.

THE HEARING OFFICER: Okay. Next witness.

MR. SAMPSON: Respondent rests.

THE HEARING OFFICER: You sure?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Okay. Do we need a recess prior to rebuttal?

MRS. PAM: There won't be any.

THE HEARING OFFICER: Would it be more comfortable for the parties to take a brief recess now, and then we'll go through formally on the record what you want to do about post-hearing procedure or [p. 227] do you have enough stamina to do it now?

MRS. PAM: We can do it now.

MR. SAMPSON: That's fine.

THE HEARING OFFICER: Normally, at the commencement of hearing, I give you my little spill [sic] about the four questions that I will ask at the end of hearing. And they usually are: Does anyone wish to have oral closing? Does anyone wish to provide a transcript? Does anyone wish to do post-hearing for post-findings of fact and conclusions of law, and if so, how long do you need to do it.

At this time, since everyone appears to be relatively familiar with the issues in this case, I have not gone through that spill [sic] at the beginning of hearing, I have just done so now. Having told you the questions I am going to ask, here they are. Does anyone wish oral closing?

MRS. PAM: No.

MR. SAMPSON: Mrs. Ibanez would like to make a short oral closing.

THE HEARING OFFICER: Okay. Fine. She's entitled. Will anyone be providing a transcript?

MRS. PAM: Yes.

THE HEARING OFFICER: Thank you. How long do you think you need to do your proposals, if you can [p. 228] tell me that now.

MR. SAMPSON: It's going to depend on the logistical problem with the record. I think 20 days.

THE HEARING OFFICER: I think that's a wise choice. It would be good if we could put at least a time frame on it now that would not hold everyone to a 30 day statutory problem. Twenty days for each side agreeable absent of the subsequent order, Mrs. Pam?

MRS. PAM: That's fine.

THE HEARING OFFICER: Since we have done this on the record and have done it quickly, I don't think it's necessary for me to reiterate the stipulations. You may have oral closing.

MRS. IBANEZ: I would like to just make reference to the fact that most of the legal argument that would be appropriate in closing will be articulated in the proposed findings of fact and conclusions of law.

I would just like to make one or two points for emphasis only, certainly not to exclude anything else. One is, I know that in the pleadings and in the defenses, there have been a lot of references to public interest and substantial government interest, and a lot of that phrase and terminology [p. 229] refers to constitutional reflections on those terms.

I would like to remind all the parties in the current proceeding that the public interest and the public welfare is also very much articulated in Chapter 455. And Chapter 455 in the regulation here in Florida, of all professional regulations, the first and foremost concern is unlicensed professionals, which I am not. I am licensed.

I don't understand this whole focus of BOA with all the unlicensed professionals out there, run the gammut, why they are spending time and resources on this. But, that focus, I don't believe, is even within the framework of going after licensed professionals. But assuming it were, under Chapter 455, of focus to be contemplated, there's still a balancing of interest, and Chapter 455 says there is a balance of interest.

It says if you are going to regulate a practice or a profession, it still must be balanced by those concerns that are to benefit the public. For the public benefit, the welfare of the public and certainly not ending up in a monopolistic or a restriction on competition. I think all the testimony as will be fully articulated in the proposed

findings of fact and conclusions of law, and [p. 230] all references to the record will clearly point out two things.

Number One: That whenever any complaint came from a private employer that was seen by the Board of Accountancy as quote no threat to competition; for example, an insurance administration firm. They said, you're working for a private employer. So, they first look at the private employer, first. That was their first focus of concentration. And, secondly, they would say, since you are an employee of a private employer that doesn't have to be registerd [sic] under 473, consequently, you are not in the practice of public accounting just an exclusion in 21A-20.011 benefits you.

However, as soon as the complaint regarding an attorney – perfect example is Mr. Brewster; perfect example is Damitz, who's one of our entrys [sic] in the record. Instead of continuing the same rational [sic] in judgment for the private employers, instead of looking at her law firm first, and saying "law firm" all right, that is a private employer. Then look at the individual and say this individual is employed by that law firm, it's a private employer; therefore, she benefits from the exclusion. Low [sic] and behold, the complete thought process and rationale, as applied by [p. 231] BOA, is now focusing not on the employer, it's now all of a sudden focused on business competition.

So, let's start – our first step shouldn't be the employer. Let's look at the individual first. Let's look at her activities. And, so you find it's consistent in the opinions that when somebody that offered competition, such as the case of Ms. Damitz, such as the case of Mr.

Brewster, such as is my case, they looked at the individual first, looked at the activities, said, oh, any of these activities are going to fall into the practice of public accounting; therefore, that makes her law firm, Ms. Damitz, Mr. Brewster, Mrs. Ibanez, ergo, in the practice of public accounting, and some rule is being violated.

So, all of a sudden the entire thought process and shift changes a hundred and eighty degrees, and the results are a hundred and eighty degrees different. We are asking for fairness. We are asking to put everybody on the same scale, on the same balance; no different than you would look at the exclusions of governmental employees.

And this will be my last point, if there is a very good exclusion in that 20A-20.011 for governmental employee – same rationale with governmental employee. They don't look at the [p. 232] activities. There's even an opinion on one that's a Department of Revenue tax auditor. Tax auditor, my gosh, if they had started with the activities first, and then said, we are going to analyze activities first; come to the conclusion that in that activity he's practicing public accounting, ergo, the Department of Revenue, State of Florida, is now in the practice of public accounting, they would never be able to testify to that.

So, anybody they deem is not competition they start as they should. They start with the entity focus first. They look at the entity. Is the entity one that benefits from that exclusion because they're either governmental or private employer? If they answer that yes, then it doesn't matter what the activities are of that professional, that is a CPA licensee. Automatically without looking any further,

without any questions, without doing any investigation, they say to that person, yes, you can use the CPA credential.

All I'm asking is for fairness. They're not misleading anybody when they use the CPA credential and I am not either. We just truthfully express to the public something they have a right to know, and something we most definitely have a right to say. [p. 233] Thank you.

THE HEARING OFFICER: Is there anything else that I need to know to make this easier on anyone? Before you all leave the room, if you would, please, check the exhibits and make sure I have all of them and no witnesses walked off with them. I appreciate your attention, folks, this hearing is concluded.

(Whereupon, the proceedings were concluded at 3.25 [sic] p.m.)

[p. 234] CERTIFICATE

THE STATE OF FLORIDA,

COUNTY OF LEON.

I, L. Carolyn Bilbrey, court reporter and Notary Public, at Tallahassee, Florida, do hereby certify as follows:

That I correctly reported in shorthand the foregoing proceedings at the time and place stated in the caption hereof;

That I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages, 4 through 122, both inclusive, contain a full, true,

and correct transcript of the proceedings on said occasion;

That I am neither of kin, nor of counsel, to any parties involved, nor in any manner interested in the result thereof;

This 13th day of September, 1991.

/s/ L. Carolyn Bilbrey
L. Carolyn Bilbrey
Notary Public
State of Florida at Large,

My Commission expires: December 12, 1994

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SILVIA S. IBANEZ, Petitioner, and JAMES R. BREWSTER and AMERICAN ASSOCIATION OF ATTORNEY CERTIFIED PUBLIC ACCOUNTANTS, Intervenors, vs. STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Respondent, and FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, Intervenor.	)	CASE NO. 92-3336R

FINAL ORDER

Upon due notice, this cause came on for formal hearing on August 1 and 2, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR PETITIONER SILVIA S. IBANEZ:	Silvia S. Ibanez, Esquire P.O. Drawer 7667 Winter Haven, FL 33883 and Michael P. Sampson, Esquire Holland & Knight P.O. Box 32092 Lakeland, FL 33802-2092
FOR RESPONDENT STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY:	John J. Rimes, III Assistant Attorney General Department of Legal Affairs The Capitol, LL04 Tallahassee, FL 32399-1050
FOR INTERVENOR JAMES R. BREWSTER:	Julie Gallagher, Esquire Stowell, Anton & Kraemer P.O. Box 11059 Tallahassee, FL 32302
FOR INTERVENOR AMERICAN ASSOCIATION OF ATTORNEY CERTIFIED PUBLIC ACCOUNTANTS:	Thomas W. McCulloch, Esquire McCulloch, Ellis & Payne Suite 800 6671 Southwest Freeway Houston, TX 77074 and Sydney S. Traum, P.A.

Semet, Lichstein,
Morgenstern
& Berger
12th Floor, Ponce De
Leon Plaza
201 Alhambra Circle
Coral Gables, FL 33134

FOR INTERVENOR FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS:

Kenneth R. Hart,
Esquire
Ausley, McMullen,
McGehee, Carothers &
Proctor
P.O. Box 391
Tallahassee, Fl 32302

STATEMENT OF THE ISSUE

Whether or not existing Rule 21A-20.012 *F.A.C.* is an invalid exercise of delegated legislative authority. See Sections 120.52(8) and 120.56*F.S.*

PRELIMINARY STATEMENT

Petitioner filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, a rule upon which a pending disciplinary action against the Petitioner is based. The two cases, the rule challenge and the disciplinary action, were first consolidated, but were subsequently bifurcated and this final order relates solely to Petitioner's challenge to Rule 21A-20.012 *F.A.C.*

At formal hearing, Petitioner Ibanez presented her own oral testimony and that of John E. Sullivan, John R. Rowe, and Martha Willis. Petitioner's Exhibits, Ibanez 1-5 and 7-9, were admitted in evidence. Intervenor James R.

Brewster presented no oral testimony, but had Brewster Exhibits 1, 2, and 6-11 admitted in evidence. Intervenor American Association of Attorney Public Accountants (AAA-CPA) presented neither witnesses nor exhibits.

Respondent presented the oral testimony of Petitioner Silvia Ibanez and Dean Dennison. Intervenor Florida Institute of Certified Public Accountants, (FICPA's) Exhibits 1-17 were admitted in evidence, without independent oral testimony.

Official recognition was taken of many items as reflected in the record.

A transcript was filed in due course and all timely filed proposed findings of fact have been ruled on in the appendix to this final order, pursuant to Section 120.59(2), *F.S.*

FINDINGS OF FACT

1. Petitioner Silvia S. Ibanez is a practicing attorney and a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). She has been charged with violating Rule 21A-20.012 *F.A.C.* in DOAH Case No. 91-4100 which is currently pending before the Division of Administrative Hearings.

2. As a license with the federal Securities and Exchange Commission. Petitioner is required to, and does, disclose the fact that she is a CPA.

3. Petitioner Ibanez is listed in the yellow pages under the heading "Attorneys" as "Ibanez, Silvia, S., CPA, CFP." On its face, there is nothing false or fraudulent about this listing. As an attorney, Petitioner also places CPA after her name on her business cards and on her letterhead. Respondent contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides one or more types of management, advisory, or consulting services, she is currently "practicing public accounting."

4. Intervenor James R. Brewster is also a practicing attorney, a Board-certified tax lawyer, and a member of the Florida Bar, and holds an active Florida CPA license. Mr. Brewster has been charged with violating Rule 21A-20.012 F.A.C. in DOAH Case No. 90-3278 which is currently pending before the Division of Administrative Hearings. The administrative complaint therein charges violations of Rule 21A-20.012 *F.A.C.*, and Sections 473.323(1)(a), (g), and (h) *F.S.* on the basis that Brewster's law firm letterhead designates him as a "CPA" and the law firm is not licensed by the Board of Accountancy as a public accounting firm.

5. Intervenor American Association of Attorney Public Accountants (AAA-CPA) is a not-for-profit corporation with its principal place of business in Mission Viejo, California. Founded in 1964,-the AAA-CPA is an active professional organization of persons dually qualified as both attorneys and CPAs. It membership is comprised of practitioners in public accounting, law, government, education, and other activities. One of the functions of the AAA-CPA is to engage in the analysis

and discussion of ethical and other issues related to practitioners who are dually licensed in the accounting and law professions. This includes monitoring and commenting upon legislation affecting the practice of law and public accountancy and participating in the development of ethical standards of lawyers and CPAs. AAA-CPA's substantial interests are affected by this proceeding in that its members are CPAs who are directly affected by the definition, scope, and regulation of the practice of public accounting by Florida Statutes and rules.

6. Respondent board of Accountancy is an agency of the State of Florida established pursuant to the provisions of chapter 473 *F.S.* Pursuant to Section 473.301 *F.S.*, the Board is authorized in the following language to regulate the "practice of public accounting":

> 473.301 Purpose. – The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

7. Respondent Department of Professional Regulations is an umbrella agency for the Board of Accountancy, established under the provisions of Section 20.16 and Chapter 455, *F.S.*

8. Intervenor Florida Institute of Certified Public Accountants (FICPA) is a Florida not-for-profit corporation with its principal place of business in Tallahassee. Founded in 1905, the FICPA is an active professional organization with approximately 17,800 members. Its membership is comprised of practitioners in public accounting, industry, government, education, law, and other activities. One of the functions of the FICPA is to engage in the analysis and discussion of issues related to the accounting profession. This includes monitoring the scope of services provided by certified public accountants in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, and participating in the development of auditing, accounting, and ethical standards of CPAs. Intervenor FICPA's substantial interests are affected by this proceeding in that its members are CPAs who are directly affected by the definition, scope, and regulation of the practice of public accounting by Florida Statutes and rules. It is even recognized in the statute. See, Section 473.302 *F.S., infra.*

9. Challenged existing Rule 21A-20.012 F.A.C., also referred to as the "holding out" rule, provides as follows:

> 21A-20.012 Holding Out. "Holding himself or itself out" as used in Section 473.302(4), F.S. is defined as publicizing that the licensee is certified public accountant when providing, or offering to provide services or products to the public, in such a manner that an uniformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate

> and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. all other publication of the fact that a licensee is a CPA constitutes holding oneself out.

10. The specific statutory authorities currently cited by the agency for the rule are Sections 473-302, 473.304 and 473.307 *F.S.* and the law implemented is cited as Section 473.302 *F.S.* Section 473.307, dealing with "experience," does not impinge on these proceedings. the remaining authorities provide as follows:

473.302 Definitions – As used in this act:

(1) "Board" means the Board of Accountancy.

(2) "Department" means the Department of Professional Regulation.

(3 "Certified public accountant" means a person who holds a license to practice public accounting in this state under the authority of this act.

(4) *"Practice of," "practicing public accountancy," or "public accounting" means:*

(a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory consulting services, by a certified public accountant or firm of certified public accountants, of this state, including the performance of such services in the employ or another person; or

(b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more

types of management advisory or consulting services, by any other person *holding himself or itself out* as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

However, these terms shall not include services provided by the American Institute of Certified Public Accountants, the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities reviewing the services provided to the public by members of these entities. [*Emphasis supplied*]

473.304 Rules of board. – The board shall adopt all rules necessary to administer this act. Every license shall be governed and controlled by this act and the rules adopted by the Board.

11. Also relevant to these proceedings is Section 473.322 *F.S.* which provides as follows:

473.322 Prohibitions: penalties. –

(1) No person shall knowingly:

(a) *Practice public accounting* unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under

this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer or opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license:

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status;

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. [*Emphasis supplied*]

12. Although it has been challenged, Rule 21-A-21.008 *F.A.C.*, the "other business activity rule," is relevant to these proceedings. That existing rule currently provides as follows:

> 21A-21.009 Other Business Activities. *A licensee engaged in the practice of public accounting may concurrently engage in another business, occupation, or profession if:*
>
> *(1) The licensee does not hold himself out as a certified public accountant in the activity,*
>
> (2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting.
>
> (3) The other business, occupation, or profession is not used to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,
>
> (4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.00(3),
>
> (5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of Chapter 473, F.S., and 21A, Florida Administrative Code, relating to integrity and objectivity,
>
> (6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others. [Emphasis supplied]

13. Although it has not been challenged, Rule 21A-20.011 *F.A.C.* is relevant to these proceedings. That existing rule currently provides as follows:

> 21A-20.011 Practice of, or Practicing Public Accountancy. *"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:*
>
> (1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or
>
> (2) Activities of licensees *who do not hold themselves out* as CPAs and who are not associated with financial statements, or
>
> (3) Activities of licensees *who do not hold themselves out* as certified public accountants. [*Emphasis supplied*]

14. Petitioner's and Intervenor Brewster's CPA certificates (like all Florida APA certificates) authorize them to display their CPA credentials. The CPA certificate represents that the recipient

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

15. The Board's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

16. Attainment of the CPA credential is an accomplishment that is recognized in the business community. The CPA credential of a Florida-licensed CPA connotes high competency and achievement levels in the discipline of accounting. Truthful communication of the CPA credential by actively licensed CPAs for identification purposes constitutes valuable disclosure to the public.

17. The use of the term "CPA" implies a specific competency to the public. The fact that Petitioner Ibanez or Intervenor Brewster is a CPA is valuable to their respective legal clients.

18. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he also holds an active CPA license is a valuable asset to that individual.

19. It is conceded by all parties that it is possible to practice law and public accounting in the same business activity.

20. There are firms that simultaneously hold themselves out as law firms and public accounting firms.

21. The activities of other regulated professionals, such as members of the Florida Bar, which overlap those of practicing CPAs are subject to the regulatory standards of their principal regulated professions and applicable judicial and administrative remedies for malpractice and negligence.

22. It is conceded by all parties that many activities conducted by professionals and nonprofessionals, other than by CPAs and other than by attorneys, are identical to

activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

23. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.*

24. Truthful use, communications, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

25. Prior to 1984, when the "holding out" rule was adopted, a Florida-licensed CPA who offered one or more types of accounting services to the public or who offered one or more types of management advisory or consulting services to the public was considered to be "practicing public accountancy," whether or not that person appended the initials "CPA" after his or her name.

26. The "holding out" rule became effective on September 17, 1984.

27. Chapter 89-87 *Laws of Florida* amended Section 473.302(4) *F.S.* (i.e., the definition of public accountancy)

but the amendment did not change the previously existing "holding out" language therein.

The "holding out" rule was adopted more than one year before the initiation of this rule challenge.

29. There is no dispute among the parties that the definition within the challenged Rule 21A-20.012 *F.A.C.* is circular. In attempting to define the term "holding out" so that the use of that term in Section 473.302(4) *F.S.* may be clarified, the rule incorporates the statutory phrase "practice of public accounting," and the term "practice of public accountancy/accounting" in Section 473.302(4)(b)*F.S.*, incorporates the term "holding out,"[1] as does Rule 21A-20.011 *F.A.C.*,[2] which creates exemptions to the statute.

30. At least one purpose of the second sentence of the existing rule seems to have been to allow all CPAs to display their CPA certificates on their inner office walls without fear of disciplinary action by the Board. The Board's expressed rationale for excluding "display of a CPA certificate" from its "holding out" rule is premised on the fact that during an office visit, a CPA can immediately disabuse any individual of the fact that s/he is practicing public accounting once that individual is inside the CPA's office. However, Petitioner demonstrated, and the Board conceded, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services

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[1] See Finding of Fact No. 10, *supra*.

[2] See Finding of Fact No. 13, *supra*.

normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

31. Clearly, there are many ways a nonattesting, activity licensed CPA who is dually licensed can clarify to those seeking his or her services which profession, function, or service s/he is willing to perform for that client.

32. On the other hand, the challenged rule does not deal with all members of the public, or members of the public specifically seeking CPA services, or members of the public seeking some other service. The rule deals with "uninformed persons." As used in the rule, the term "uninformed person" is undefined and has been subject to differing speculative interpretations by the Board and by non-Board witnesses, some of which interpretations address such broad categories as anyone using a telephone book.

33. The Board also suggested that only display of the original CPA certificate on an inside office wall would be exempt from prosecution for publication, but a reasonable person could interpret the rule on its face to permit posting the CPA certificate or an exact facsimile of the certificate on a sign outside an office building or circulating as business cards exact reduced-size copies of the certificate even though these types of "publication" or "display" would not provide the same opportunity as an office visit would provide for the CPA to disclose to individuals the actual services the CPA was offering to perform.

34. Accordingly, there has been no rational basis for the "holding out" rule's distinction between "display" of

the licensee's CPA certificate and other forms of truthful, nonmisleading publication of the CPA licensure/status.

35. The agency's expressed rationale behind its adoption of the "holding out" rule was to define the meaning of the statutory term "holding out," as used in Section 473.302(4)*F.S.*, a term which has also been adopted into a number of other rules (see, *supra*), so as to provide guidance on when a person who has been licensed as a CPA is engaged in the "practice of public accounting." Specifically, the Board maintained that the "holding out rule" and the "other business activity rule" given licensees two options. Under the first option, the "holding out" rule permits licensees to retain their CPA certificates when not in compliance with all of the provisions of Chapter 473*F.S.*, and the rules promulgated thereunder, as long as they do not publicize themselves as CPAs. Alternatively, the Board perceives that under the second option, if licensees do publicize themselves as CPAs when performing services for the public, licensees become subject to regulation by the Board and are held to the standards of competency and conduct which are applicable to all CPA's who use their accounting skills for the public while trading on the fact of their licensure as a Florida CPA.

36. However, the words "publicizing" and "publication" as used in the "holding out" rule are also undefined. Although Respondents submitted that the "common usage" of these words is sufficient to embrace listings in the yellow pages, it is also quite possible to give these words as a far broader reading to encompass the "assumption" and "use" of the designation "CPA" and the "assumption" and "use" of the CPA credential,

which "assumption" and "use" are specifically reserved to all actively licensed CPAs and which designation is permitted to be inserted after their names on signs, cards, or devices by Section 473.322(1)(b)*F.S.* [see Finding of Fact No. 11] and by the CPA certificate itself which permits them to "append" CPA after their names [see Finding of Fact No. 14].

37. The rule *has* actually subjected CPAs, and specifically has subjected Petitioner and Intervenor Brewster, to DPR disciplinary proceedings independent of any other act or wrongdoing merely for any "publication" of the CPA credential in a form other than display of the original CPA certificate on an inner office wall. The rule *may* automatically subject attorney-CPA licensees to DPR disciplinary proceedings independent of any other act or wrongdoing merely on the basis of passive, truthful communications which are otherwise in full compliance with the standards of the Florida Supreme Court and Florida Bar. The rule has the potential for being interpreted so as to prohibit CPAs such as Petitioner and Intervenor Brewster from making disclosures of their earned status as CPAs to various regulatory bodies to which they are required by law to disclose that information. See, Findings of Fact 1 and 2, *supra*. The rule can be invoked to limit their income by chilling their appearance as expert CPA witnesses for a fee even if they never work for an uninformed lawman at all. Applicants for certain state employments and candidates for public office may run afoul of the rule due to the disclosure requirements of public office. Even at risk is the CPA called as a factual witness who is then sworn to tell the truth and asked innocuous biographical information. One's desire to

attain a CPA credential may be chilled by the hazard of using it.

38. Chapter 473 *F.S.* contains limitations on competitive negotiation, prohibits accepting contingent fees, prohibits the payment of certain commissions, and establishes other prohibitions to which persons who are deemed to be "practicing public accountancy" must adhere. some of these prohibitions are contrary to normal, ethical practice of other professions, i.e., acceptance of contingent fees by lawyers. If the rule remains intact, the Board and DPR under Chapters 473 and 455 *F.S.* have the potential of breaching the confidentiality of CPA-attorneys, legal clients' files. See, Section 473.316(5) and 473.318 *F.S.* Since attorneys are exclusively overseen by the Florida Supreme Court, the rule potentially violates the doctrine of "separation of powers" among the three branches of state government.

39. Therefore, the definitional rule creates a wedge whereby the Board may insinuate its discipline into other professions and confuses dually licensed CPAs from knowing how they may behave in each profession without running afoul of discipline in the other. In application with other rules, the "holding out" rule sets confusing and varying standards for agency decisions involving attorneys, bankers, CPAs employed by private corporate employers, and CPAs with their own financial consultant firms.

40. The Board of Accountancy has issued a series of letter opinions based on the "holding out rule" or based on that rule read in conjunction with Rule 21A-21.009 *F.A.C.*, the "other business activity rule," which indicate

that a Florida CPA who does not "hold out" to the public as a CPA and who is not associated with financial statements is permitted by the Board to engage in other business activities without complying with the provisions of Chapter 473 *F.S.* that is, not being subject to UPR discipline, because the Board does not view that A in those activities as "practicing public accountancy." Also, the Board of Accountancy has issued a series of opinions to the effect that, by virtue of Section 473.302(4) *F.S.* and the "holding out rule," a CPA who "holds out" (publicizes his or her status as a CPA) is automatically, by definition, "practicing public accounting," regardless of what actual business activity he is performing. These opinions also indirectly insinuate the Board of Accountancy into many other professions, including the practice of law, which the Board has no statutory mandate to regulate pursuant to Section 473.301 *F.S.* The plethora of opinions issued by the Board dramatize the confusion experienced by CPAs who have sought to have the Board interpret the rule in question on a case-by-case basis.

41. Testimony of the Chairman of the Board was offered to establish that absent the challenged rule, the Board cannot reasonably regulate negligence in the profession and that absent the rule, only fraud could be prosecuted by the Board. He testified that, in his opinion, the challenged rule means that a CPA performing tax services for a client is not doing public accounting" if "CPA" is not appended after the CPA's name in advertising and that *that* CPA cannot be disciplined by the Board for negligence, any more that he could be disciplined if he were a non-CPA doing tax services. The Chairman further opined that a CPA doing tax services is doing

public accounting only *if* he appends CPA after his name, and in that instance, the Board can and will discipline *that* CPA for negligence, should he commit any. Further, the Chairman indicated that if Rules 21CPA-21.009, 21A-20.011, and 21A-20.012 *F.A.C.* were not simultaneously in place, the actively licensed CPA who places CPA after is name could not be disciplined by the Board for negligence, but only for fraud. Precisely how this would occur was not made clear, but upon the foregoing, together with the Board opinions admitted in evidence, it is concluded that the Board has utilized what purports to be purely a definitional rule to establish disciplinary jurisdiction and that in certain instances the rule puts DPR in the precarious position of *only* being able to prosecute CPAs with "CPA" appended after their names, but not CPAs who perform the same services and who do *not* append "CPA" after their names. Such a result is nonsensical.

42. The Board does not seriously suggest that if Rule 21A-20.012 *F.A.C.* is invalidated, Rule 21A-20.011 would provide a blanket exclusion from all provisions of Chapter 473 *F.S.* for CPAs "using" or "assuming" or "publicizing" their status. At a minimum, such CPAs would have to maintain their credential as would any other CPA for good character, payment of fees, and recertification for competency based on continuing education.

43. What has actually occurred here is that the Board has consciously utilized Rules 21A-20.011 and 21A-20.012 *F.A.C.* so as to not enforce Section 473.302(4)(a) as written and so as to selectively enforce only Section 473.302(4)(b) *F.S.* Then, by its selective enforcement of Rule 21A-20.012, the Board has gone a

step further. The Board has "interpreted" Section 473.302(4)(b) to include within Board jurisdiction not those functions, activities, or skills a CPA practices or holds out to the public for a fee as constituting "practicing public accountancy" but has made the definition of "practicing public accountancy" encompass *any* disclosure of CPA status or skill attainment, regardless of the disclosure's truth and regardless of whether or not the CPA is utilizing any of the functions, activities, or skills of a CPA. By so doing, the Board has exceeded its statutory mandate and legislative purpose as set forth in Section 473.301 *F.S.*

44. On its face, Rule 21A-20.012 *F.A.C.* consists of three sentences, which, in relationship to each other, are inconsistent and contradictory. Specifically, sentence ONE seems to be based on the overall representation made by a CPA to "uninformed persons." It simultaneously presumes fraud in the communication of what otherwise would be truthful, passive information.[3] Sentence THREE subjects the CPA to discipline, absent any fraud and totally without consideration to the impression formed by "uninformed persons" from the use of the CPA designation in any manner other than display of the certificate.[4]

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[3] The first sentence defines "holding out" as, " . . . publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such a manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting."

[4] "All other publication [besides display of the certificate and license] of the fact that a licensee is a CPA constitutes holding oneself out." [Bracketed material added for clarification.]

45. Because there are two incompatible definitions in the challenged rule as now drafted, the Board is at liberty to selectively enforce the statute. One CPA could be prosecuted for simply disclosure of credential status or neutral biographical information (Ibanez). Another CPA might be prosecuted only after examination of the totality of his circumstances to determine if the circumstances mislead "uninformed persons" into believing he abides by all the regulations promulgated under Chapter 473 *F.S.*, and still another CPA would never be prosecuted unless he performs the attest function. This is nonsensical and clearly unfair.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.56 *F.S.*

2. Upon the foregoing findings of fact it is clear that Petitioner, Respondent, and all intervenors have standing in this proceeding.

3. Petitioner bears the burden to go forward and prove that Rule 21A-20.012 *F.A.C.* is an invalid exercise of delegated legislative authority. *Agrico Chemical Co. v. State Department of Environmental Regulation*, 364 So.2d 759 (Fla. 1st DCA 1978), *cert. denied*, 376 So.2d 74 (1979). It is a stringent burden of proof. *Adams Smith Enterprises v. Florida Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1980).

4. Petitioners asserted that the economic impact statement (EIS) prepared pursuant to Section 120.54(2)(b) *F.S.* prior to adoption of Rule 21A-20.012 *F.A.C.* was inadequate and thus the Board of Accountancy failed to comply with appropriate rulemaking proceedings. They further asserted that such failure, if not specifically fatal, is indicative of other flaws in the rule. Since the rule in question was effective in September 1984, an attack on the EIS is foreclosed at this late date. See, Section 120.54(2)(d) *F.S.* and *Herring v. Department of Administration*, 9 FALR 5210 (1987).

5. Pursuant to Section 473.304 *F.S.*, the Board of Accountancy has authority to adopt all rules necessary to administer Chapter 473 *F.S.*

6. Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this act," the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious. See, *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063, 1067 (Fla. 1984).

7. Citing *Peninsular Supply Co. v. C.B. Day Realty of Florida*, 423 So.2d 500 (Fla. 3d D.C.A. 1982) and *State ex rel, Szabo Food Services Inc., of N.C. v. Dickson*, 286 So.2d 529 (Fla. 1973), Respondents asserted that the Legislature's reenactment of Chapter 473 *F.S.* after "sunset review" subsequent to the effective date of the challenged rule (see, Chapter 85-9 *Laws of Florida*) and amendment of Section 473.302(4) *F.S.* (see, Chapter 89-87 *Laws of Florida*)

without modifying the "holding out" language therein creates a conclusive presumption that the challenged rule is a valid exercise of delegated authority. The first case is clearly distinguishable and should be rejected. *Peninsular Supply Co.* stands for the proposition that the legislature's enactment of a new statutory right cannot implicitly abrogate a common law right firmly entrenched by court decisions. The facts enunciated in *Szabo* are more closely on point, but the legal presumption is not conclusive. That case hinges in part on presumptions peculiarly applicable to tax cases, and therein the prior administrative interpretations were considered merely "persuasive unless erroneous or clearly unauthorized." Therefore, even if *Szabo* is appropriate for the premise for which it is cited, it permits the presumption to be rebutted, where, as here, the result of the rule's application by the Board has led to nonsensical results. The Legislature cannot be presumed to have intended an absurd result. See, by analogy, *State v. Safer,* 368 So.2d 620 (Fla. 1st DCA 1979); *State Farm Mut. Auto. Ins. Co. v. O'Kelley,* 349 So.2d 717 (Fla. 1st DCA 1977).

8. Respondents also contended that the challenged rule may not be held invalid because it is definitional in nature and contains no affirmative or negative requirements. However, where a definitional rule enacted for purposes of exemption enlarges, modifies, or contravenes specific provisions of the law implemented, it may be declared invalid. See, Section 120.52(8)(c) *F.S.* and *Department of Natural Resources v. Wingfield Development Co.,* 581 So.2d 193 (Fla. 1st DCA 1991). Here, the rule's application does that and as applied with other rules also has invaded the practice of other professions, rendering the

rule overbroad and exceeding the Board's authority. See, Section 120.52(8)(b) *F.S.*

9. The purpose of Chapter 473 *F.S.* is set forth in 473.301 *F.S.*, which reads as follows:

> 473.301 Purposes – The legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary *to regulate the practice of public accounting* to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare *to regulate the practice of public accountancy* in this state. [*Emphasis supplied*]

10. Under Section 120.52(8)(d) *F.S.*, a rule may also constitute an invalid exercise of delegated legislative authority if it is vague and fails to establish adequate standards for decision making. A rule is vague or fails to establish adequate standards for agency decisions if persons of common intelligence must necessarily guess at its meaning and differ as to its application. See *State v. Cumming,* 365 So.2d 153 (Fla. 1978).

11. The first sentence of Rule 21A-20.012 *F.A.C.* defines "holding out" as follows:

> "Holding himself or itself out" as used in Section 473.302(4), *F.S.*, is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, *in such a manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting.* [*Emphasis supplied*]

This first sentence suggests that whether or not a practitioner is "holding out" is based on the overall representation made by the CPA, as interpreted by an "uninformed person." The terms "uninformed person," and "publicizing" are not defined and are subject to a number of interpretations. This sentence, unmodified by sentences two and three, also presumes that, whatever "publicizing" is, it must be misleading.

12. In sharp contract to the first sentence of the rule, the remainder of Rule 21A-20.012 provides:

> The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. *all other publication of the fact that a licensee is a CPA constitutes holding oneself out.* [*Emphasis supplies*]

As the term "holding out" is defined in the second and third sentences, a CPA is "holding out," and therefore subject to all the requirements of Chapter 473 *F.S.*, simply by truthfully using the "CPA" designation in any manner other than display of the CPA certificate. Under the definition contained in sentences two and three, as contrasted with the definition under the first sentence of the rule, no consideration is given to the impression made upon uninformed persons by the practitioner as to whether or not the practitioner is actually practicing public accounting and therefore is subject to the Board's jurisdiction. The term "publication" is likewise undefined here.

13. Whether or not a practitioner is "holding out" is dependent upon which portion of the rule is being relied upon, the first sentence or the following two. Also, as clearly demonstrated, Rule 21A-20.01, *F.A.C.* is, on its

face, both vague and internally contradictory and is, therefore, subject to widely differing interpretations, not the least of which is what jurisdiction over fraud *versus* jurisdiction over negligence resides in the Board. Although at formal hearing the Board and FICPA asserted that this rule is necessary to regulate negligent (as opposed to fraudulent) activities of licensed CPAs, the purported purpose of the "holding out" rule was to inform licensed CPAs as to what constitutes "holding out," and in conjunction with Rules 21A-20.009 [sic] and 21A-20.011 *F.A.C.*, to give CPAs the opportunity to engage in practices other than public accounting without being subject to the jurisdiction of the Board and the requirements of Chapter 473 *F.S.* Except for the blanket assertion that the public assumes the CPA designation, however used, symbolizes oversight by the licensing authority, no explanation was offered to justify the apparent contradiction between the intent to allow some CPAs to fall outside the Board's jurisdiction and the desire, now, to ensure that the Board maintains jurisdiction for disciplinary purposes over CPAs dually licensed in other professions.

14. The Board and FICPA's position is that the rule is justified and reasonable since any display or publication of a licensee's CPA credential, other than the display of the CPA certificate and license on an inner office wall, would deceive members of the public into believing that the individual is abiding by all regulations of the Board. The Board is also concerned because it will have difficulty discerning which CPAs may be prosecuted unless every benefit to a CPA from disclosing his or her CPA

status, however slight that benefit is, concomitantly subjects the disclosing CPA to all aspects of Board regulation. However, the Petitioner has shown that passive dissemination of factual information is not necessarily detrimental to the public and is not contrary to the expressed purpose of the Act. Indeed, Section 473.301 *F.S.* states a threefold purpose for Board regulation of the "practice of public accounting": (1) to assure minimum competence; (2) to assure accuracy of audit statements upon which the public relies; and (3) to protect the public from dishonest practitioners. None of these purposes seems served by the rule as presently drafted.

15. The rule at issue seems intended to prohibit publication of a licensee's CPA status when that publication would confuse or mislead consumers as to whether the licensee is performing public accounting services or some other type of professional service at a particular time. The rule does not accomplish that intent, but rather utterly confuses a licensee as to when an activity, legitimate on its face, is proscribed and subject to disciplinary prosecution.

16. The Board seeks to impose disciplinary oversight to protect the public against both fraud and negligence, but one statutory and regulatory scheme ranges far beyond that legitimate purpose, contrary to the expressed legislative intent for the Board. The rule is overbroad, vague, contradictory, and ambiguous.

17. The Legislature's avowed purpose for the Board is to "regulate the practice of public accounting." The circuitous nature of the challenged rules has, through

other rules, permitted the Board to insinuate its regulation into professions other than accounting, regardless of the nature of those professions work or other business activities, simply because the licensees are simultaneously licensed as CPAs and have truthfully indicated that they hold CPA licenses. However, those other rules have not been challenged herein and because the foregoing analysis of the challenged rule's other failings (overbroad, facially vague, internally contradictory, and ambiguous) resolves the issue that the challenged rule is not valid because it is arbitrary and capricious (see, Section 120.52(8)(e) *F.S.*), it is not necessary to further address those ancillary issues.

18. Although the rule's challengers have also raised issues including but not limited to the rule's conflict with federal and state constitutional safeguards of free speech and against restraint of trade, the undersigned is without jurisdiction, power, or authority to resolve those issues and will not attempt to do so. Cf, *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1st DCA 1982).

Upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Rule 21A-20.012 *F.A.C.* constitutes an invalid exercise of delegated legislative authority.

DONE and ORDERED this 15th day of January 1992 at Tallahassee, Florida.

ELLA JANE P. DAVIS,
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675 Suncom 278-9675

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Petitioner, vs. SILVIA IBANEZ, Respondent.	)	CASE NO. 91-4100

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on August 27, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR RESPONDENT: Tobi C. Pam, Esquire
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

FOR RESPONDENT SILVIA S. IBANEZ: Silvia S. Ibanez, Esquire
Post Office Drawer 7667
Winter Haven, FL 33883
and
Michael P. Sampson, Esquire
Holland & Knight
Post Office Box 32092
Lakeland, FL 33802-2092

STATEMENT OF THE ISSUES

(1) Count I of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges Respondent Certified Public Accountant (CPA) practiced public accounting in an unlicensed firm by appending the CPA designation after her name in the telephone book and on business cards in violation of Sections 473.323(1)(a), (g), and (h) *F.S.* and Rule 21A-20.012 *F.A.C.*

(2) Count II of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA violated Sections 473.323(1), (g), and (h) and Rule 21A-24.001(1)(g) *F.A.C.* by appending the certified financial planner (CFP) designation along with the CPA designation after her name in the telephone book and on business cards, in that the CFP designation allegedly is an unapproved specialty of accountancy.

(3) Count III of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA practiced public accounting by holding herself out as a CPA by appending the CPA designation after her name in the telephone book and on her business cards, implying that she abides by the provisions of Chapter 473 *F.S*, and is thereby in violation of Sections 473.323(1)(f), (g), and (h) *F.S.* and Rule 21A-24.001 *F.A.C.* [no specific subsections cited].

PRELIMINARY STATEMENT

Silvia S. Ibanez (Ibanez) filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, one of the rules upon which this instant disciplinary action by the Department of Professional Regulation (DPR) against Respondent Ibanez is based. That case was styled *Ibanez et al. v. Board of Accountancy et al.*, DOAH Case No. 91-3336R. On June 13, 1991, DPR filed this instant disciplinary action against Ibanez. The initial administrative complaint was triggered by anonymous notification to DPR of the contents of Ibanez' telephone listings and business card. The two cases were consolidated.

DPR filed an amended administrative complaint on July 30, 1991, which amendments were opposed by motion. In consideration of those motions, the amended administrative complaint was modified by the Order of Reconsideration entered August 22, 1991.

After bifurcation and formal hearing in the rule challenge, the instant disciplinary case was heard in formal hearing on August 27, 1991.

DPR had three exhibits admitted in evidence and presented the oral testimony of Louis Dooner, Elise Rice, and Martha Willis.

Ibanez had admitted twelve exhibits and presented the oral testimony of Robert Goss. Respondent Ibanez also testified on her own behalf.

A transcript was provided.

The parties also stipulated that the testimony and exhibits from the rule challenge, *Ibanez et al. v. Board of*

Accountancy et al., DOAH Case No. 91-3336R, would be copied, certified, and adopted into the record of the instant case. That has been accomplished.

All timely filed proposed findings of fact have been considered and ruled on in the appendix to this recommended order, pursuant to Section 120.59(2) *F.S.*

This recommended order relates solely to the instant disciplinary action.

FINDINGS OF FACT

1. Respondent Silvia S. Ibanez is a practicing attorney, a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). At all times material, she has been actively certified as a CFP in good standing with the International Board of Standards and Practice for Certified Financial Planners (IBCFP).

2. The IBCFP is a corporation. "CFP" and "certified financial planner" are registered trademarks. The IBCFP has no governmental affiliations within the state of Florida. The Florida Board of Accountancy has no involvement in the CFP accrediting process and no proprietary interest over the CFP mark.

3. As a licensee with the federal Securities and Exchange Commission, Ibanez is required to, and does, disclose the fact that she is a CPA.

4. Ibanez' CPA certificate (like all Florida CPA certificates) authorizes her to display her CPA credentials. The CPA certificate represents that the recipient,

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

5. The Board of Accountancy's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

6. The Board of Accountancy issued a letter opinion to Ibanez that a CPA who offers financial planning services for a fee but who does not hold out as a CPA or become associated with financial statements would not be practicing public accounting.

7. Ibanez is listed in the yellow pages under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." Respondent also is listed in the white pages as "Ibanez, Silvia S., CPA CFP atty." On their face, there is nothing false or fraudulent about these listings. As an attorney, Petitioner also places "CPA" after her name on her business cards and on her letterhead. The Respondent's business card states "Sylvia [sic] Safille Ibanez, JD, CPA, CFP." DPR contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides

one or more types of management, advisory or consulting services, she is currently "practicing public accounting."

8. Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs."

9. Neither the CFP nor CPA credential is part of the firm name, "Silvia S. Ibanez, P.A. – Law Offices," which also appears on Ibanez' business card. Ibanez' telephone directory listings and card at issue show the CPA and CFP credentials strictly appended to Respondent's individual name.

10. Louis Dooner, accepted as an expert certified public accountant, testified that the Respondent is involved in the practice of public accounting because by merely appending the CPA designation after her name on her business cards, she is telling the public that she is offering to perform services that CPAs perform.

11. Respondent Ibanez currently operates as a sole practitioner of law employed by the law firm of "Silvia S. Ibanez, P.A." As such, she provides specialized legal services for her clients not provided by CPAs. As part of her current, normal professional activities as an attorney, she provides all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, and evaluation of the tax consequences of certain transactions. She also performs financial counselling and planning for her clients. In doing so, she utilizes both her legal education, training, and experience and her education, training, and experience as a CPA. Prior to admission to the Florida Bar, Ibanez was employed by two CPA firms where she did substantially similar work, plus audits.

12. It is conceded by the parties that it is possible to practice law and public accounting in the same business activity and that many activities conducted by professionals and nonprofessionals other than by CPAs and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

13. Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

14. The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

15. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.* There is no evidence that Respondent Ibanez attests as a CPA in the

course of her law practice or that she personally performs audits.

16. Ibanez testified credibly that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP.

17. Respondent Ibanez has clearly marked her office premises with all the indicia of a law office, including two signs posted outside the building itself. One sign specifies that the building constitutes "law offices," that "Silvia S. Ibanez, P.A." is located there, and that Ibanez is an "attorney at law," with no reference to her CPA or CFP credentials. Another sign specifies, "law offices," without any reference to her CPA or CFP credentials. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. Once in the building, a potential client also must be admitted by a secretary to Ibanez' inner office.

18. Ibanez has consistently required her secretary to screen all telephone calls and potential clients who enter the office to be certain that persons seeking out Ibanez will be fully informed that Ibanez is not offering strictly accounting services and that she is practicing law. Ibanez also personally makes that information clear to individuals at each initial office consultation and consistently follows up office consultations at which her legal employment has been negotiated with letters and/or employment contracts which set forth the parameters of the legal services she has agreed to perform for clients.

19. Elise Rice is an employee of Petitioner Department of Professional Regulation who has earned a vocational school accounting diploma. She is not a CPA, nor is she an attorney. Ms. Rice testified that she, personally, drew the conclusion from looking at Respondent's business card that the Respondent was a CPA, but that she did not know what CFP or JD signified and therefore she would not assume from the card that Ibanez was a lawyer or a certified financial planner. Clearly, the designation "CFP" did not suggest to Ms. Rice that Ibanez was advertising either a specialty or particular competence in public accounting.

20. Ms. Rice further stated that, despite Ibanez' business card's clear use of the term "law offices," she would continue to believe that Ibanez was doing both CPA work and legal work of "law offices." Ms. Rice further stated that even if she telephoned ahead and spoke to a secretary who clearly indicated that Ibanez was a CPA but was working as a lawyer, she would persist in believing that Ibanez was doing both CPA work and legal work out of "law offices." Ms. Rice also testified that if she arrived at Ibanez' office building and was confronted by the sign posted there which clearly indicates Ibanez is an attorney at law and the two signs that clearly state that the building houses only "law offices," she would then believe that she had come to the wrong place to find Ibanez the CPA. However, Ms. Rice conceded that, under the latter circumstances, the premises were, indeed, law offices. Ms. Rice's personal view that Ibanez must be acting as a CPA in the face of significant information to the contrary is not persuasive that the average layman would be misled by Ibanez' business

card and telephone listings in the face of all her other disclosures.

21. One who has initially consulted the yellow pages of the telephone directory under the heading "attorneys" would most logically infer from Ibanez' yellow pages listing that Ibanez is a practicing attorney who is dually licensed as a CPA and who possesses a CPA's education, training, experience, and skills and that Ibanez is offering to act as a lawyer capable of applying her additional education, training, experience, and skills as a CPA and CFP.

22. The inferences that the average viewer might draw from Ibanez' white pages telephone listing and her business card are more blurred, but Ibanez demonstrated, and it is conceded by both parties, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

23. It may be reasonable that at least until making direct contact with Ibanez or her office staff, the average viewer of either the telephone listings or the card would assume that, as a CPA, Ibanez is subject to disciplinary oversight by the licensing authority for accounting functions only and that she abides by all Board of Accountancy regulations while doing accounting. However, prior to any meaningful employment, Ibanez exercises reasonable care to disabuse the average viewer of that belief.

24. Since 1982, the Board has consistently issued letter opinions on an individual basis to the effect that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board and further holding that "CFP" could not be displayed by CPA licensees on stationery or in yellow pages listings in conjunction with the CPA designation. The Executive Director of the Florida Board of Accountancy did not know how "certified financial planner" came to be viewed as a specialty designation of certified public accounting, and the letter opinions do not set forth the Board's rationale for considering it as a specialty. The Board has adopted no rule to that effect. Further, in this proceeding, the agency has not proven any rationale for the policy set forth in the Board opinions.

25. The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever mislead [sic] members of the public purely by displaying their credentials in the manner Ibanez has done here.

26. DPR knows of no complaint and has never received any complaint from a member of the public regarding Ibanez' professional activities or advertising. Nor is there any evidence that any member of the public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead into hiring Ibanez under the impression that she would be acting as a CPA solely and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA.

27. Upon the scenario established in the case *sub judice*, Ibanez is not guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all regulations of the Board of Accountancy.

CONCLUSION OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) *F.S.*

2. Respondent is charged in the three-count amended administrative complaint with several violations of Sections 473.323(1)(a), (f), (g), and (h) and of Rules 21A-20.012 and 21A-24.001 *F.A.C.* solely because she is alleged to be "practicing public accounting or accountancy." The counts overlap in some respects as discussed *infra*.

3. Section 473.302(4) *F.S.* provides, in pertinent part:

> (4) "Practice of," "practicing public accountancy," or "public accounting accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory or consulting

> services, by any other person holding himself or itself out as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.
>
> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

4. Section 473.323(1) *F.S.* provides, in pertinent part:

> 473.323 Disciplinary proceedings.
>
> (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
>
> (a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;
>
> * * *
>
> (f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;
>
> (g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

5. Rule 21A-20.011 *F.A.C.* defines "practice of," or "practicing public accountancy" as follows:

> 21A-20.011 Practice of, or Practicing Public Accountancy
>
> "Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:
>
> (1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or
>
> (2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or
>
> (3) Activities of licensees who do not hold themselves out as certified public accountants.

6. Rule 21A-20.012 *F.A.C.* attempted to define "holding out," as follows:

> 21A-20.012 Holding Out
>
> "Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publication of the fact that a licensee is a CPA constitutes holding oneself out.

However, Rule 21A-20.012 *F.A.C.* has been ruled invalid in a Final order entered simultaneously herewith in *Ibanez et al. v. DPR, Board of Accountancy,* DOAH Case No. 91-3336R.

7. Rule 21A-24.001 *F.A.C.* is a rule of many subparts defining and precluding certain forms of advertising by CPAs.

8. In their prehearing stipulation, the parties stipulated, as fact, that the Board of Accountancy will not deem Ibanez' activities, including those of an accounting nature, to be public accounting activities if any of the three exclusions under Rule 21A-20.011 *F.A.C.* apply. This stipulation is more in the nature of a stipulation of law than one of fact and has been treated as such. The parties also stipulated as matters of law that the exclusion in Section (3) of Rule 21A-20.011 *F.A.C.* is wholly dependent on the definition of "holding out" and that the credential "CFP" is not a "self-designation" as used in Rule 21A-24.001(1)(g) *F.A.C.*

9. DPR asserted that Ibanez is engaged in "practicing public accounting" as set forth in one or both of the definitions of that term contained in subparagraphs (a) and (b) of Section 473.302(4) *F.S.* Ibanez countered to the effect that she was exempt from those statutory definitions on the basis of one or more of three exclusions to

the term "public accounting," which are set forth in Sections (1), (2), and (3) of Rule 21A-20.011 *F.A.C.*, and therefore, she could not be held to have violated any portion of Chapter 473 *F.S.* More specifically, Ibanez urged that because she is working as an attorney within a P.A. (which she asserted is an employer not required to be licensed under Chapter 473 *F.S.*), she falls under exception 21A-20.011(1) *F.A.C.*

10. First, Rule 21A-20.011 *F.A.C.* cannot be fairly interpreted or legally construed as a blanket exemption from the applicability of *all* Chapter 473 *F.S.* provisions. Minimally, Ibanez remains subject to the Chapter's payment of fees, continuing education, and good moral character requirements. Secondly, Ibanez' argument with regard to Section (1) of that rule is not persuasive, since she renders personalized services in her own right directly to the public, regardless of certain liability and tax protections afforded her personally by the "P.A." status of her law firm.

11. Whether or not Ibanez comes within the remaining exceptions set forth in Sections 21A-20.011 (2) and (3) *F.A.C.* depends upon how the term "holding out" as used therein is interpreted. The definition of "holding out" is not wholly tied to the invalidated rule, 21A-20.012 *F.A.C.* Absent that rule, interpretation of the statutory term "holding out" is appropriate. Normally, the clear common meaning of the statutory term would be applied. Unfortunately, in this proceeding, statutory interpretation is still rendered "circular" due to Rule 21A-20.011(2) and (3) *F.A.C.*

12. The definition of "practicing public accounting" contained in Section 473.302(4)(a) *F.S.* encompasses Ibanez, who is a CPA licensee. That definition covers "offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, *by a certified public accountant, . . .* " regardless of whether or not the CPA "holds out." [Emphasis supplied] However, Sections (2) and (3) of Rule 21A-20.011 *F.A.C.* address Section (a) as well as (b) of 473.302(4) *F.S.* The rule provides that, " *'Practice of, practicing public accountancy' as defined by Section 473.302(4) F.S. shall exclude* any of the following . . . (2) activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or (3) activities of licensees who do not hold themselves out as certified public accountants." [Emphasis supplied] It is fairly debatable whether Rule 21A-20.011(2) and (3) *F.A.C.* legitimately interpret the legislative intent of Section 473.302 (4)(a).[1] It is also fairly debatable whether or not Rule 21A-20.011 *F.A.C.* exceeds the Board's statutory mandate and insinuates the Board's discipline into other professions. However, no petition to determine the validity of Rule 21A-20.011 *F.A.C.* has been filed. Therefore, Rule 21A-20.011 *F.A.C.* continues to be entitled to the great weight normally afforded existing agency rules.

---

[1] It seems abundantly clear that absent the exceptions of Rule 21A-20.011 *F.A.C.*, Section 473.302(4)(a) *F.S.* would render actively licensed CPA Ibanez subject to Board discipline whether she "holds out" or not, and it is only section 473.302(4)(b) which includes the term "holding out."

13. Great weight must be afforded to the agency's interpretation of the statutes it administers. It is recognized that DPR and the Board have consistently declined to prosecute any CPA offering all the services Ibanez does unless that CPA was also "holding out" in some manner. It is further recognized that in the instant case, DPR has stipulated that if any of the three exemptions in Rule 21A-20.011 *F.A.C.* applies, then Ibanez' activities, including those of an accounting nature, do not constitute public accounting activities. Applying the three foregoing principles, it ultimately must be concluded that Ibanez' activities, even though she is a licensed CPA, do not constitute "practicing public accounting" *unless* she is one of those "holding themselves out as certified public accountants."

14. Ibanez interprets financial statements, but she is not "associated" with them in the sense that term is normally applied to CPAs. She is not attesting or performing audits. She is not performing any activity that *requires* licensure by the Board of Accountancy. The Board admittedly could not discipline a non-CPA for performing the accounting activities Ibanez is performing.[2] Some of the activities Ibanez performs are the same as activities performed by CPAs. Many are not. As an attorney, she also performs specialized services for her clients that are

[2] Section 473.322(1)(c) *F.S.*, which reserves the "attest" function strictly to CPAs, also specifies that, "This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

not performed by other CPAs. Her telephone listings and business card do not "hold out" that she will perform any activity exclusive to public accounting or that she will perform work *as* a CPA. All indicia of her office premises, all of her disclaimers, and the majority of actual activities she performs support a conclusion that she is not "holding herself out as a certified public accountant." It is therefore concluded that she is not "holding herself out as a certified public accountant" practicing public accountancy so as to be subject to discipline for the violations charged in the instant amended administrative complaint. Nor is she guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all the regulations of the Board of Accountancy. Moreover, if the purpose of the police power here exercised is to protect the public, it is difficult to see how the public is harmed by Ibanez' advertising or services, which services she provides only after reasonable – indeed elaborate – efforts at avoiding any misapprehension of her CPA status by those employing her.

15. In making the determination that Ibanez is not "holding herself out as a CPA," the undersigned has weighed both the permissions granted to the Respondent by the Board of Accountancy in its certificate of licensure and the permissions granted to the Respondent by the Legislature under Section 473.322 *F.S.*[3] The undersigned

[3] Section 473.322 *F.S.* permits a CPA to assume and use his or her validly earned credential and title and to put it in words, letters, abbreviations, signs, cards and devices so long as s/he is actively licensed. The credential provides much the same. See, Finding of Fact 4, *supra*.

also has considered the thrust of the opinions in *Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013 (Fla. 1st DCA 1981) and *Florida Accountants Assoc. v. Dandelake*, 98 So. 2d 323 (Fla. 1957). *Dandelake* considered the occupational rights of accountants who are not certified *viz a viz* the Board's regulatory powers. *Cenac* considered the situation of an inactively licensed CPA performing many but not all the services normally considered "practicing public accountancy."

16. Although this is a case of first impression with regard to an actively licensed CPA and those cases were decided with regard to different predecessor statutes and absent any similar rule in place, they provide direction. Those cases are persuasive (1) that a balanced weighing of all indicia of the "practice of public accounting" is to be done when determining whether or not a practitioner is "holding out as a CPA," (2) that a single indicator of whether or not a practitioner is "holding out" should not outweigh any other indicator, and (3) that the degree of benefit derived by the CPA from use of his or her CPA status must also be balanced against any real or potential harm therefrom to the public.

17. On their face, Ibanez' business card and yellow pages listing may reasonably be considered "advertising." "Advertising" is commonly thought of as constituting "holding out" a person, a product, or a service, but in this case, Ibanez' business card and yellow pages listing go no further than conveying to the public passive, but valuable, biographical information which every actively licensed CPA is entitled to assume, use, and append to his name in a variety of ways. The record is utterly

devoid of any evidence that Ibanez has mislead the public into believing she would perform all the functions of a CPA. The fact that her listing in the yellow pages is under the heading "attorneys" and is not associated with accountancy headings is especially significant in this regard, as is the care with which she has labelled her law office and instructed her staff. No dishonesty or misleading activity has been shown in this case, except to the extent that advertisement of her CPA status initially inaccurately suggests that she is subject to broad disciplinary oversight by the licensing agency. Her subsequent disclaimers as to what she will or will not undertake professionally would seem to "cure" any potential for the public to be mislead by her advertising.

18. In analyzing all indicia of "holding out," disclaimers may be considered. In the recommended order underlying the *Cenac* case, Hearing Officer Ayers considered as significant all disclaimers by the practitioner to his clients that the practitioner was not practicing public accounting or was not offering all of the services normally associated with CPA status. The reviewing court did not disturb the hearing officer's assessment that such disclaimers are significant to determine the issue of "holding out" and the issue of whether there had been actual or potential fraud upon the public.[4]

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[4] The opportunity and effectiveness for use of disclaimers by professionals so as to not mislead the public has most recently been explored in *Peel v. Attorney Registration and Disciplinary Comm'n*, ___ US ___, 110 S. Ct. 2281, 110 L.Ed. 2d 83 (1990). See, also "Post-Peel Battles", *The National Law Journal*, Vol. 14 No. 17-18 (December 30, 1991 – January 6, 1992).

19. Although DPR urges a more literal and far more restrictive reading of the term "hold themselves out as public accountants," such a highly restrictive interpretation is not appropriate when dealing with commercial free speech. Commercial free speech constitutes expression related exclusively to the economic interests of the speaker and the audience. DPR's concept that merely appending the designation "CPA" after Ibanez' name misleads the public and must be prevented would constitute a speaker specific, unqualified ban on a category of expressive activity without any appropriate limitation based on time, place, or manner. Since this record is devoid of proof that anyone has been mislead by Ibanez, and it is clear her disclosure is valuable to her audience, great care must be taken before applying a highly restrictive interpretation of the statute. Contrary to DPR's urging, where a less restrictive interpretation is available, one should not assume that *any* benefit to the CPA, no matter how small that benefit may be, will be sufficient to concomitantly subject the CPA to discipline absent some demonstrated harm to the public. Consequently, where, as here, no evil to be prevented by the police power has been clearly demonstrated, the balance weighs against finding Ibanez to be "holding out."

20. The concept of balancing the benefit derived by the speaker (a CPA in this case) against the evil sought to be defended against by the police power of the state was only peripherally discussed in *Cenac*, but that balancing test for interpreting statutes has since been echoed and refined in other cases involving commercial free speech. See, *Central Hudson Gas v. Public Service Commission*, 447 US 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and *Florida*

Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). The potential for harm to the public must be recognizable and must clearly outweigh any anticompetitive impact, and other, less restrictive means of regulating the licensee must not be available. Blanket prohibitions on commercial speech are disfavored in the law. Any restriction on commercial speech requires the government goal to be substantial and the cost to be carefully calculated. There must be a "reasonable fit" between the statute's ends and the means chosen to accomplish those ends. Government may ban commercial speech that is more likely to deceive the public than to inform it or commercial speech that is related to illegal activity. However, in most other contexts, the First Amendment prohibits regulation based on the content of the speech, provided the content is basically truthful. Where the information is presented in a way that is not deceptive it should be permitted even though potentially misleading. See, *Fane v. Edenfield*, Case No. 90-3943 U.S. Ct of Appeals, 11th Circuit, 945 F. 2d 1514 (October 30, 1991), specifically ruling that Chapter 473 *F.S.* "must be narrowly tailored to achieve its anticipated objectives." See also, *Bd. of Trustees of State University of New York v. Fox*, 492 US 469, 109 S.Ct. 3028, 106 L. Ed. 2d 388 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475; *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 US 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986); *In re R.M.J.*, 455 US 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); and *Consolidated Edison Co. of N.Y., Inc. v. Public Service Cmm'n*, 447 So. 2d 530, 100 S.Ct. 2326, 65 L. Ed. 2d 319 (1980). If this statutory and regulatory scheme were interpreted as DPR requests, it could be determined to be unconstitutional.

Courts have a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with constitutional provisions. See, *Industrial Fire & Casualty Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1983); *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977); *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953). Accordingly, a construction of the statutory term "holding out" in consonance with the rationale in *Cenac* and *Dandelake* that the public is only harmed if substantially misled avoids any potential constitutional conflict in interpreting the provisions of Chapter 473 *F.S.* What is important in Ibanez' case is that, although she is an actively licensed CPA, she has induced no unwarned reliance on her CPA certification. She has made full disclosure with disclaimers appropriate to the situation.

21. The foregoing conclusion that Respondent Ibanez is not "holding herself out as a CPA" so as to be subject to license revocation, suspension, or other discipline by the Board resolves in her favor all issues raised in all three counts of the Amended Administrative Complaint. However, that pleading is somewhat less than clear, so some further commentary as to the specific charges may be in order.

22. Count I of the Amended Administrative Complaint originally contained allegations under Sections 473.309 and 473.3101 *F.S.* that Ibanez' law firm should have been licensed and was unlicensed as a certified public accounting firm. That allegation was withdrawn by Petitioner as reflected in the August 22, 1991 Order on Reconsideration. Consequently, Count I of the Amended Administrative Complaint herein only charged Ibanez

pursuant to Sections 473.323(1)(a) *F.S.* [violation of Sections 473.317 and 455.227(1) or any other provisions of Chapter 473 *F.S.*], Sections 473.323(1)(g) *F.S.* [fraud or deceit, or of negligence, incompetency or misconduct *in the practice of public accounting*] and 473.323(1)(h) *F.S.* [violation of any rule adopted pursuant to chapters 473 or 455], and Rule 21A-20.012 *F.A.C.*, now determined to be invalid. [Emphasis supplied]

23. Section 473.317 *F.S.* involves competitive negotiation wherein the licensee will attest as an expert in accountancy. Section 455.227(1) *F.S.*, is a professional disciplinary "catchall." The Amended Administrative Complaint herein alleges no specific acts constituting competitive negotiation and no factual evidence to that effect was introduced at formal hearing. The evidence is clear that Ibanez does not perform the "attest" function unique to CPAs which is an integral part of Section 473.317 *F.S.* DPR's proposed recommended order does not even argue those issues. Due to DPR's withdrawal of the charges in Count I specifically citing Sections 473.309 and 473.3101 *F.S.*, as recognized in the Order on Reconsideration, it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions which were withdrawn. Therefore, even *if* Ibanez were practicing public accounting and was therefore subject to the Board, those charges alleged under Count I were not established in this case.

24. Under Count II, Ibanez was also charged with violating Sections 473.323(1)(g) [fraud or deceit, or of negligence, incompetency, or misconduct, *in the practice of public accounting*] and (h) *F.S.* [violation of any rule adopted pursuant to Chapters 473 or 455 *F.S.*] and Rule

21A-24.001(1)(g) *F.A.C.* Therein, Ibanez was prosecuted for her use of the CFP designation as a specialty designation on her business cards and in her yellow pages listing. In Count III, Ibanez was prosecuted for using her CPA designation in such a way that it is "misleading," in that she has allegedly represented to the public that she abides by all provisions of Chapter 473 *F.S.* Count III specifically charged Ibanez pursuant to Section 473.323(1)(f) [advertising goods or service sin a manner which is fraudulent, false, or misleading in form or content] and again pursuant to Sections 473.323(1)(g) and (h) *F.S.* and apparently under *all* of the sections of Rule 21A-24.001 *F.A.C.*

25. Assuming, *arguendo,* that Ibanez had been found to be "practicing public accounting" so as to be subject to the advertising rule, she still could not be found guilty of committing any violation thereof alleged under Counts II or III upon the facts in this record. Either because of her active CPA licensure or because Ibanez has, in fact, earned the CPA and CFP credentials or because the rule sections simply do not apply, Ibanez' situation does not fall within Sections (1)(a) through (f) or Section (1)(h) of Rule 21A-24.001 *F.A.C.* With regard to the remaining sections of that rule, (1)(j), (g), and (i), the Board's opinions have declared "CFP" to be an unrecognized specialty of public accounting. The Board also has never recognized the IBCFP. However, the Board has promulgated no rule concerning "CFP" specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "certified financial planner" contained in its letter opinions. Ms. Rice's testimony belied any suggestion that the CFP

designation used with the CPA designation *implies* specialization in public accounting or misleads the public to that effect. Certainly, Ms. Rice did not *infer* that Ibanez' use of the abbreviation "CFP" "held out" a specialty of public accountancy. With further regard to (1)(g) of that rule, it should be recognized that Ibanez has not stated on her cards or in the yellow pages that CFP is an accountancy specialty or that by obtaining that credential, she is a specialist in public accounting, and DPR has stipulated that for purposes of Section 21A-24.001(1)(g), "CFP" is not a "self-designation." Rule 21A-24.001(1)(i) specifies that a CPA may not state a non-Board form of recognition using the word, "certified." "CFP" is a form of recognition by an entity other than the Board, but there is no clear and convincing evidence of a violation of Section 21A-24.001(1)(i) since Ibanez has only implied the word "certified" by using the abbreviation "CFP." There also is no proof her use of "CFP" and/or "CPA" and "CFP" has mislead [sic] anyone.

26. Therefore, even *if* Ibanez were practicing public accounting and were therefore subject to the Board, none of the charges alleged under Counts II or III were established in this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Accountancy enter a Final Order that:

(1) Finds Respondent Ibanez is not "holding herself out as a certified public accountant" and

(2) Finds her not guilty of all charges alleged under Counts I through III and dismisses them

DONE and ENTERED this 15th day of January, 1992, at Tallahassee, Florida.

/s/ Ella Jane P. Davis
ELLA JANE P. DAVIS,
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 15th day of January, 1992.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party *at least 10 days* in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. *You should consult with the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order.* Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

Copies furnished to:

Michael P. Sampson, Esquire
Holland & Knight
P. O. Box 32092
Lakeland, FL 33802-2092

Silvia S. Ibanez, Esquire
P.O. Drawer 7667
Winter Haven, FL 33883

Tobi C. Pam, Esquire
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

Martha Willis
Executive Director
Board of Accountancy
Suite 16
4001 Northwest 43rd Street
Gainesville, FL 32606

Jack McRay
General Counsel
Department of Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0792

Courtesy Copies to:

John J. Rimes, III
Assistant Attorney General
Department of Legal Affairs
The Capitol, LL04
Tallahassee, FL 32399-1050

Kenneth R. Hart, Esquire
Stephen C. Emmanuel, Esquire
J. Jeffry Wahlen, Esquire
Ausley, McMullen, McGehee, Carothers & Proctor
P.O. Box 391
Tallahassee, FL 32302

Julie Gallagher, Esquire
Stowell, Anton & Kraemer
P.O. Box 11059
201 South Monroe Street, Suite 200
Tallahassee, FL 32302

Sydney S. Traum, P.A.
Semet, Lickstein, Morgenstern & Berger, P.A.
Twelfth Floor, Ponce De Leon Plaza
201 Alhambra Circle
Coral Gables, FL 33134

Thomas W. McCulloch, Esquire
McCulloch, Ellis & Payne
6671 Southwest Freeway, Suite 800
Houston, TX 77074

Mr. James R. Brewster
2212 Yaupon
Tallahassee, FL 32303

Case No. 91-4100

APPENDIX TO RECOMMENDED ORDER
CASE NO. 91-4100

The following constitute specific rulings pursuant to Section 120.59(2) *F.S.* upon the parties' respective proposed findings of fact (PFOF):

DPR's 39 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories has *not* been utilized in the recommended order (RO): 1, 9-11, 13-15, 20, 24, 26, 34-36, 38.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or

constitute or contain a conclusion of law (COL) or constitute mere legal argument, but otherwise the subject matter is covered in the RO: 2-3, 12, 25, 27, 31-33, 37, 39.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues once Rule 21A-20.012 is invalidated: 16-19, 21-23, 28, 32.

Rejected as immaterial except to the degree covered in the RO: 4-8.

Accepted in part and rejected in part on issues of credibility; covered in the RO: 29-30

Respondent's 56 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories or which is material only to the rules challenge case and not this disciplinary case has *not* been utilized in the recommended order (RO): 1-7, 10, 14, 17, 24, 34-35, 40, 42-46, 48-50, 52-56.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or constitute or contain a conclusion of law (COL) or constitutes mere legal argument, but otherwise the subject matter is covered in the RO: 11-13, 15, 19, 27, 39, 47, 51.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues in this disciplinary case: 8-9, 16, 18, 20-23, 25-26, 28-33, 36-38.

Rejected as Immaterial: 41.

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF ACCOUNTANCY

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Petitioner,

vs.

SILVIA IBANEZ,

Respondent.

_____/

DOAH CASE NO. 91-4100
DPR CASE NO. 90-13805

FINAL ORDER OF THE BOARD OF ACCOUNTANCY

(Filed May 12, 1992)

THIS CAUSE came on before the Florida Board of Accountancy at a regularly scheduled meeting on April 23, 1992 in Tampa, Florida pursuant to a Proposed Recommended Order of Hearing Officer, Ella Jane P. Davis dated January 15, 1992. The Board, noting that no exception [sic] have been filed and after reviewing the complete record, including all exhibits, hereby enters this Final Order of the Board of Accountancy.

FINDINGS OF FACT

The Board after a complete review of the record and the transcript of the hearing in the above-style cause,

hereby accepts the Proposed Findings of Fact of the Hearing Officer as set forth in her Recommended Order of January 15, 1992, with the exception of the following:

The second sentence of paragraph 7, and paragraphs 13, 21 and 23 of the Proposing [sic] Findings of Fact are legal conclusions and should not properly be in the Proposed Finding of Fact and are therefore struck. As to Proposed Finding of Fact No. 24, the next to the last sentence is partially incorrect, insofar as the Board has adopted a rule (Rule 21A-24.001(1)(g)-(j) [specifically Rule 21A-24.001(1)(i)]) setting forth, in rule form, the Board's policy as to the use of the term "certified" and its relationship to false, fraudulent, deceptive and misleading advertising. As such therefore, for purposes of the disciplinary action, neither the Department of Professional Regulation, nor the Board of Accountancy (which is a nominal party to the disciplinary action) is required to prove up the rationale for that rule. Paragraph 27 is struck as a legal conclusion inappropriately found in the Proposed Findings of Fact.

CONCLUSIONS OF LAW

The Conclusions of Law of the Hearing Officer in her Recommended Order of January 15, 1992 erroneously misapply the provisions of Chapter 473, F.S., and Chapter 21A, F.A.C., as well as misanalyze applicable provisions of the United States Constitution relating to regulations on commercial speech. In light of the foregoing, the Board of Accountancy is compelled to reject the Conclusions of Law of the Hearing Officer, and to substitute the following.

I

Initially it should be noted that, with the exception of the attest function,[1] all other activities of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida. As a result, with the exception of the attest function, Chapter 473, F.S., is a "Title Act." To the extent that Chapter 473 is a Title Act, its sole purpose is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302(4), F.S., that a CPA will be subject to technical, educational and other standards promulgated by the Florida Legislature and the Board of Accountancy. Further, a consumer is assured that the CPA will adhere to certain regulatory requirements deemed necessary by the Legislature of the State of Florida to assure the independence, objectivity and integrity of the CPA.[2]

---

[1] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted only to certified public accountants, see Section 473.322(1)(c), F.S.

[2] Including *inter alia*, Section 473.315,F.S., and Rule 21A-22, technical standards mandated by the legislature and promulgated by the Board of Accountancy; prohibitions on commissions and contingent fees, Section 473.3205, and 473.31, F.S.; requirements that a CPA not violate any of the disciplinary provisions of Chapter 473.323 and Rule 21A-36, that a CPA's practice will comply with the licensure of partnerships corporations, and rules promulgated thereunder, see Section 473.309, and 473.3101, F.S. All of the foregoing are in addition to 473.322(1)(b), F.S., which requires that any individual using the term "CPA" in the State of Florida must hold an active license (including meeting all continuing education requirements) from the Board of Accountancy.

As was noted in *Abramson v. Gonzalez*, 949 F.2d 1565 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

In light of the foregoing, it is necessary to address what, under Florida Statutes, is the practice of public accountancy. The provisions of Section 473.302(4), F.S. define the practice of public accountancy as follows:

> "Practice of," "practicing public accountancy," or "public accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory of consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

The Board of Accountancy has further refined the term in question through the promulgation of both Rule 21A-20.011, F.A.C,[3] excluding certain activities from the practice of public accountancy," and Rule 21A-20.012, F.A.C.,[4]

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[3] This rule was promulgated to exempt certain activities of CPAs, from the practice of public accountancy either when those CPAs are not, in fact, offering accounting services to the public, but only to their employer, or when they are not associated with financial statements and/or when they are not holding themselves out as certified public accountants. The rule was promulgated in order to address the concerns raised in *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st DCA 1981). In *Cenac*, the First District Court of Appeal clearly indicated that to define the practice of public accountancy so as to foreclose the use of the broad range of accountancy skills to CPAs who do not trade on the fact of their licensure through advertising or public display of the appellation "CPA," and who are not engaged in the preparation of financial statements, could result in an unconstitutional and unreasonable attempt to regulate and prohibit activities of individuals who happen to hold licenses as CPAs, but who do not trade on the fact of their licensure as CPAs.

[4] This rule has recently been declared invalid, see *Ibanez et al., v. State Board of Accountancy et al.*, DOAH Case No. 91-3336R, Opinion rendered January 15, 1992. Appeals pending before the First District Court of Appeal Case Nos. 92-439, 92-440. While

defining the term "holding out" which is contained in Section 473.302(4)(b), F.S.

To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Title in commerce while using their accounting skills for the public, are not subject to the jurisdiction of the Board of Accountancy.[5]

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the Board could rely on Rule 21A-20.012 pending the appeal, see Rule 9.310(b)(2), Fla.R.App.P., the Board's ruling in the instant cause is based solely upon the provisions of Chapter 473 and *other* applicable rules.

[5] It is specifically to be noted that other than by committing acts of fraud, see Section 473.323(1)(k), F.S., or lack of good moral character, see Section 473.323(1)(m), F.S., or similar violations CPAs can only be disciplined by the Board of Accountancy, if they are practicing public accountancy, and they are found guilty of the violations set forth in Section 473.323, F.S. In other words, with the above mentioned exceptions, CPAs who are not practicing public accountancy can not [sic] be disciplined by the Board of Accountancy for their transgressions.

The Hearing Officer, in coming to her conclusion that Respondent was not practicing public accountancy, and thus can not [sic] be guilty of false, fraudulent, deceptive or misleading advertising, depended largely upon a constitutional analysis, which, in the Board's opinion, is flawed. As is noted above, with the exception of the attest function (not at issue herein, since Respondent does not perform the attest function), Chapter 473 and [sic] is a Title, not a Practice act.

In *Abramson v. Gonzalez, supra,* at pp. 1575-1577, the Eleventh U.S. Circuit Court of Appeals analyzed at length the impact of Title Acts, as they relate to First Amendment guarantees of freedom of speech. While holding that unlicensed individ-uals [sic] cannot be prohibited from using generic terms, which described activities that they are permitted to perform under a Title Act, the Eleventh Circuit was firm in its opinion, that, if "unlicensed" individuals call themselves "licensed", they would be engaging in false, deceptive or misleading advertising and be subjected to penal provisions, including criminal and injunctive proceedings.

In the instant cause, Respondent is essentially engaged in the same type of activity which the Eleventh Circuit held could be banned by the State. In other words, Respondent advertises the fact that the [sic] she is a CPA, while performing the same "accounting" activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors she may be guilty when delivering her services to her clients.

Respondent is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising.[6] Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not.[7] In light of the foregoing, Respondent is in violation of Rule 21A-24.001

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[6] See *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916 100 L.Ed.2d 475 (1988), *Peel v. Attorney Registration and Disciplinary Com'n.*, ___ U.S. ___, 110 S.Ct. 2281, 2287 (1990), Rule 4-7.2 Rules of the Florida Bar.

[7] It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Section 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether nor not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA in without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

and Section 473.323(1)(f), F.S. by engaging in deceptive, false and misleading advertising.

In order to analyze whether the Board's interpretation of its statute and rules is constitutional, one must turn to the Supreme Court's test for regulations on protected commercial free speech, set forth in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

It is obvious that the use of a professional license appellation such as "CPA" is a form of commercial speech which, in the case of a CPA who holds an active individual license, is not illegal or inherently misleading. Thus, the statutes which limit the use of "CPA" licensure designation do impact First Amendment rights and satisfy the first prong of the *Central Hudson* test.

The second prong is satisfied, since it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, indeed a vital one, see

United States v. Arthur Young & Co., 465 U.S. 805, 817-821, 104 S.Ct. 1495, 1503-1504, 79 L.Ed.2d 826 (1984), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964).

The rules and statutes in question satisfy the third prong of furthering the abovementioned governmental interest through making sure that only an individual who meets certain standards is permitted to call oneself a CPA. Included in those standards is the requirement that if an individual provides accounting services to the public while trading on the fact of his/her licensure, one must subject oneself to the statutes and rules governing the practice of public accountancy in the state. Needless to say, the use of the term "CPA" by an individual providing accounting skills and services to the public, while that individual at the same time asserts that one is not subject to the regulations of the statutory body created to regulate certified public accountants, would not further the purpose for CPA licensure set forth in Section 473.301, F.S.

Finally, the statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., and knowledge that any individual trading on the fact they are CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034 106 L.Ed.2d 388 (1989). Since the

statutes and regulations only apply to those individuals who are engaged in offering accounting services to the public, as opposed to those who are in government or providing services only to their employer, it is appropriate that individuals should not be permitted to append the term "CPA" after their name, even though they hold an active license, if they are providing accounting services and skills to the public, but are not in compliance with all provisions of Chapter 473.[8]

The Hearing Officer's ruling that Respondent's advertising that she is a CPA in the telephone directory and in her business communications, can be remedied by verbal and visual disclaimers is in error. In essence, Respondent advertises the fact that she is a CPA to the general public, and performs identical or similar services

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[8] The Hearing Officer apparently placed great weight upon the fact that the CPA certificate states that the recipient "has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant." See Proposed Finding of Fact No. 4, and Proposed Conclusion of Law No. 15. The certificate is, of course, only evidence of a license. It is difficult to conceive, when construing the above mentioned terms on the CPA's certificate, that an individual is entitled to advertise the fact of licensure if that individual was not in compliance with all provisions of Chapter 473, and Chapter 21A, F.A.C. To do otherwise, would be to permit an individual to use the title "Certified Public Accountant" when advertising and providing accounting skills and services to the public, but not to be subject to those statutes and rules, which were specifically enacted to secure the integrity and objectivity of CPAs when providing such services.

to those which Respondent admits she performed in licensed CPA firms. Respondent and the Hearing Officer, however, apparently believe that since Respondent could verbally tell potential clients that she was not practicing public accounting, that the clients would have no reasonable expectation that Respondent would be subject to the rules and regulations of the Board of Accountancy. Potential clients, however, would clearly see Respondents [sic] use of the title "CPA" in her advertisements as an inducement to contact Respondent and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy. Since Respondent uses her accounting skills in then providing services to clients, it is illogical to believe that any disclaimer would disabuse a client of believing that Respondent's failure to meet adequate standards of professional competence would not result in disciplinary action by the very agency which granted her the license which she trades upon. It is axiomatic that the improper use of a Title when providing the services described by the Title by an individual either not licensed under the act, or unwilling to comply with various provisions of the statute and rules, when holding a license, is inherently misleading and may be prohibited. See *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988). Since Chapter 473 and the rules promulgated thereto place reasonable conditions upon CPAs who wish to trade upon the fact of licensure in connection with using accounting skills and providing accounting services to the public, it is apparent that the Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as

a CPA, constitutes a "reasonable fit" for constitutional purposes.[9]

II

The Hearing Officer also found that the use of the term "CFP" (standing for Certified Financial Planner) by Respondent, in the telephone directory yellow pages, as

[9] It is asserted by Respondent that since she is an attorney regulated by the Florida Bar, that the Board of Accountancy's assertion that she must comply with the provision of Chapter 473 and the rules promulgated thereto when she trades on the fact of her licensure as a CPA, and provides accounting services, constitutes the unlawful regulation of the practice of law. This position is erroneous. The mere fact that the Florida Bar permits attorneys to list other professional licenses as part of their credentials, see Rule 4-7.4, Rules of the Florida Bar, does not, and can not limit the responsibility of the dual license-holding attorney of complying with the requirements and rules of the other profession. It is obvious, for example, that any attorney who happens also to be a real estate broker, and who sells real estate in his law practice, can and will be subject to the Florida Real Estate Commission, for any violations of Chapter 475, and the rules promulgated thereto when he is selling real estate. This does not mean that the attorney will not also be subject to the rules of the Florida Bar, if, in the same real estate transaction, the attorney gave an erroneous title opinion. Dual license holding can and should subject the license holder to dual responsibility to the regulatory agencies having jurisdiction over the licensee. It is up to the licensee to resolve conflicts between the rules and statutes of the regulatory bodies, either by modifying the licensee's practice, so as to comport appropriately with all regulatory bodies, whose profession is being practiced by the licensee, or to cease leading the public to believe that the licensee complies with all regulatory requirements by trading on a license, when the license will not adhere to the strictures of that profession.

well as on her business card and letterhead, was not a violation of Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), F.S.

Rule 21A-24.001(1)(g)-(j) and (2) states as follows:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
> (g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice or public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or
>
> (h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or directly, [sic] of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead.

Insofar as the Board has found above that Respondent is practicing public accounting, it is obvious, as a matter of law, that her advertisements in the yellow pages, business cards and letterhead of the fact that she is

a Certified Financial Planner through the use of the initials "CFP", are violations of Rule 21A-24.001 as set forth above, and therefore, Section 473.323(1)(f), F.S.

Paragraph 25 of the Hearing Officer's Conclusions of Law, wherein she tasks the Board of Accountancy for not "proving up any rationale" for it's [sic] *rule* relating to the use of the term "certified" is outside the purview of the instant Section 120.57(1) proceeding. A Hearing Officer of the Division of Administrative Hearings, when faced with a promulgated rule, must apply that rule to the facts set before her. It is not necessary for the agency to prove up the rationale for the rule in every Section 120.57(1), F.S. hearing relating to the application of that rule before the Division of Administrative Hearings.

Notwithstanding the foregoing, the rationale for the Board's prohibition of the publication of credentials using terms such as "certified" by CPAs practicing public accounting when those designations have not been approved by the Board of Accountancy as specialties in the practice of public lexicon, "certified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.

In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and

the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the term "CPA" when the Board has, in fact, approved a form of recognition or self designation using such terms as a Board approved speciality. It is to be noted that the Board has the authority to approve the use of such speciality designation by CPAs, however, no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

As such therefore, it is apparent that Respondent has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy.

CONCLUSION

Based upon the foregoing, Respondent is hereby found to be in violation of Section 473.323(1)(a), (f), (g), (h) and Rule 21A-24.001, F.A.C., and is hereby disciplined as follows:

Respondent is hereby REPRIMANDED with the imposition of the reprimand being stayed until any appellate proceedings in this cause are completed.

DONE and ORDERED this 23rd day of April, 1992, by the Florida Board of Accountancy.

/s/ Beryl H. Davis,
BERYL H. DAVIS,
CHAIRMAN

CC: Counsel of Record

wp/Ibanez(S)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SILVIA, S. IBANEZ,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-1994.

Opinion filed June 9, 1993.

Appeal from an order of the Department of Professional Regulation.

Silvia S. Ibanez, P.A., Winter Haven and J. Lofton Westmoreland, of Moore, Hill & Westmoreland, Pensacola, for appellant.

Lisa S. Nelson, Assistant General Counsel, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

ZEHMER, BARFIELD, and MICKLE, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

June 9, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez v. State of Florida, Dept. of Professional Reg.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for attorney's fees is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Laurie Black
Deputy Clerk

[SEAL]

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 28, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez — v. State of Florida, Dept. of Professional Reg.

Appellant(s), — Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing filed, June 23, 1993, is hereby DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Rhonda Causseaux
Deputy Clerk

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff
Robin Harmon, Clerk

[SEAL]

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV
(Section 1, in part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

455.227 Grounds for discipline; penalties; enforcement.

(1) The board shall have the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure, or otherwise discipline a licensee, if the board finds that:

* * *

473.301 Purpose. The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

History – ss. 1, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.317 Competitive negotiation.

(1) A licensee shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed.

(2) As used in this section, "competitive bid" means the submission of an offer to a prospective client, as distinguished from an existing client, or representative thereof, by a licensee, either orally or in writing, directly or indirectly, as either a prime contractor, a subcontractor, or a subcontractor using a prime contractor as a conduit, to perform a professional engagement for an estimated fee, a fixed fee, or a basis of fee when the surrounding facts and circumstances indicate that another licensee will be asked to make an offer, has been asked to make an offer, or has been made an offer which has not been rejected to perform the same professional engagement for an estimated fee, a fixed fee, or basis of fee as defined in this section. The performance of an engagement for a specific purpose, which engagement by its nature is not expected to recur, does not create an "existing client" relationship.

(3) The term "subcontractor" as used in this section means a subcontractor whose actions, together with the surrounding facts and circumstances, are in such a manner as to make him a party to a competitive bid or bids, either with respect to a specific engagement or as a result

of a series of engagements with the same prime contractor, without regard to whether a subcontract is entered into before or after the bid.

(4) A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.

(5)(a) If a licensee's proposal in subsection (4) is the only proposal received or accepted by a person or entity, the licensee may negotiate a basis of fee for that engagement. If a person or entity receives more than one proposal for the same engagement, the person or entity may rank, in order of preference, the licensee to perform the engagement. The licensee ranked first may then negotiate a contract with the person or entity giving, among other things, a basis of fee for that engagement. Should the person or entity be unable to negotiate a satisfactory contract with that licensee, negotiations with that licensee shall be formally terminated, and the person or entity shall then undertake negotiations with the second-ranked licensee. Failing accord with the second-ranked licensee, negotiations shall be terminated and undertaken with the third-ranked licensee. Negotiations with the other ranked licensees shall be undertaken in the same manner. Once negotiations have been undertaken with a subsequent licensee, a licensee shall not contract with the requesting person or entity for the same engagement.

(b) The Legislature or the governing body of a municipality, in negotiating with licensees with respect to an audit engagement, may reopen formal negotiation with any one of the three top-ranked firms.

History – ss. 16, 25, ch. 79-202; ss. 1, 2, ch. 81-194; ss. 2, 3, ch. 81-318; s. 3, ch. 83-265; ss. 10, 11, ch. 85-9; s. 2, ch. 86-102.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.322 Prohibitions; penalties.

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills,

including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status.

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083.

History – ss. 20, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9; s. 104, ch. 91-224.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

(b) . . .

(c) . . .

(d) . . .

(e) . . .

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

FLORIDA BOARD OF ACCOUNTANCY REGULATIONS

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as certified public accountants and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

Specific Authority: 473.302, 473.304, 473.307, F.S. **Law Implemented**: 473.302, F.S. **History**: New 12-4-79, Amended 9-17-84, 1-25-87.

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to

provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publications of the fact that a licensee is a CPA constitutes holding oneself out.

Specific Authority: 473.302,473.304, F.S. **Law Implemented**: 473.302, F.S. **History**: New 9-17-84.

21A-21.009 Other Business Activities

A licensee engaged in the practice of public accounting may concurrently engage in other business, occupation, or profession if:

(1) The licensee does not hold himself out as a certified public accountant in that activity,

(2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting,

(3) The other business, occupation, or profession is not u... to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,

(4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.001(3),

(5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of Chapter 473, F.S. and 21A, Florida Administrative Code, relating to integrity and objectivity,

(6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others.

Specific Authority: 473.304, 473.315, F.S. **Law Implemented**: 473.315, F.S. **History**: New 9-16-84.

21A-24.001 Advertising

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy in any advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of this Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. **Specific Authority**: 473.304,473.323, F.S. **Law Implemented**: 473.323,F.S. **History**: New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.